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# Keeping the Boss out of the Bedroom: California's Constitutional Right of Privacy as a Limitation on Private Employers' Regulation of Employees' Off-Duty Intimate Association

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**Keeping the Boss Out of the Bedroom: California’s  
Constitutional Right of Privacy as a Limitation on Private  
Employers’ Regulation of Employees’ Off-Duty Intimate  
Association**

Erich Shiners\*

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I. INTRODUCTION

The resignation of Boeing Chief Executive Officer Harry Stonecipher in March 2005 put the issue of co-worker relationships back in the headlines. Boeing requested Stonecipher’s resignation after an internal investigation revealed he was conducting an extramarital affair with a female Boeing executive.<sup>1</sup> Interestingly, the affair itself did not violate company policy.<sup>2</sup> Rather,

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1. Carol Hymowitz & Joann S. Lublin, *Many Companies Look the Other Way at Employee Affairs*,

the resignation was prompted by Boeing's potential embarrassment in light of Stonecipher's hiring just fifteen months earlier to "bolster ethical practices" at the company.<sup>3</sup> This potential damage to Boeing's reputation provided an ostensible reason why the resignation was necessary to protect Boeing's business interests, a justification that, under current law, Boeing need not have made to successfully defend a wrongful discharge claim by Stonecipher.

The Stonecipher incident was unusual only in that it involved a company CEO. In a 2003 survey by the American Management Association (AMA), thirty percent of respondents said they had dated a co-worker.<sup>4</sup> Over half of those relationships "led to marriage or a long-term relationship."<sup>5</sup> While employers fear such relationships will lead to conflicts in the workplace,<sup>6</sup> it is not an inevitable consequence of co-worker dating.<sup>7</sup> Perhaps as a result, employees have become more tolerant of a co-worker romance,<sup>8</sup> provided the couple maintains a low profile in the workplace.<sup>9</sup>

To date, American courts and legislatures have failed to acknowledge the increased acceptance of intimate association between co-workers. Most states, including California, still allow employers to terminate an employee based on his or her intimate relationship with another employee, even if that relationship has no effect on the workplace.<sup>10</sup> While some states have passed laws prohibiting adverse employment action based on employees' lawful off-duty conduct, these

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WALL ST. J., Mar. 8, 2005, at B1.

2. *Id.*

3. *See id.* (reporting that Boeing's Board of Directors concluded Stonecipher's affair violated the company's code of conduct prohibiting "behavior that may embarrass the company"). The Board was particularly concerned with a series of sexually explicit e-mail messages between the two participants. Attorney Karen Kaplowitz speculated that the embarrassment would not have existed, or at least would not have been as severe, if Stonecipher had been writing them to his wife, thus belying Boeing's statement that it was unconcerned with the morality of Stonecipher's conduct. *Id.*

4. Andrea Minarcek, *Taboo on Office Romance Fading*, COX NEWS SERV., June 29, 2004, <http://www.azcentral.com/ent/dating/articles/0629officeromance29.html> (on file with the *McGeorge Law Review*).

5. *Id.*

6. *See* Randy Dotinga, *To Date, or Not to Date*, CHRISTIAN SCI. MONITOR, Feb. 14, 2005, available at <http://www.csmonitor.com/2005/0214/p13s02-wmgn.htm> (on file with the *McGeorge Law Review*) (citing a 2002 report by the Society for Human Resource Management and CareerJournal.com in which eighty-one percent of human resources officials who responded "said that workplace relationships are dangerous because they could lead to conflict in the workplace").

7. *See* Minarcek, *supra* note 4 (reporting that a relationship between two middle school teachers was supported by both colleagues and students and that a female bank employee's relationship with her co-worker and future husband "was so fun that . . . [she] actually looked forward to work").

8. *See id.* (reporting that the AMA survey showed two-thirds of respondents approved of employees dating one another).

9. *See* Dotinga, *supra* note 6 ("What bothers people a lot is when [co-workers] act like two lovebirds, always hugging at lunch, playing footsie under the table, blowing kisses to each other." (quoting Andrew DuBrin, a psychologist and professor of management)).

10. *See* 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 5.12, at 711 (3d ed. 2004) ("[C]ourts have upheld the discharge of employees for dating or marrying coworkers."); *infra* Part III.A (discussing the current state of wrongful termination law when discharge is based on co-worker intimate association).

laws have failed to provide protection for off-duty intimate association.<sup>11</sup> Thus, a private sector employer currently has legal authority to force an employee to choose between continuing a relationship with a co-worker and keeping his or her job, regardless of the relationship's impact on the employer's business interests.<sup>12</sup>

However, California's private sector employees have a potential protection in this area unavailable to employees in other states: the California Constitution's article I, section 1 right of privacy. California courts have recognized that this right applies to intimate association<sup>13</sup> and have also used it as a limitation on private employers' regulation of their employees' off-duty conduct in the area of drug testing.<sup>14</sup> Accordingly, California courts should also recognize the privacy right as a limitation on employers' ability to base employment decisions on off-duty intimate conduct. Of course, this limitation would not be absolute. As a defense to a wrongful termination in violation of public policy claim, an employer could show that the relationship genuinely impacted the employer's business interests. Placing such a burden on the employer would remove the thumb from the scale favoring the employer's interests, thereby allowing proper recognition and protection of the employee's privacy interest in his or her off-duty intimate association.

This Comment begins in Part II with a brief examination of the nature and scope of the right of privacy under the United States and California Constitutions. Part III examines case law developments in the field of employer regulation of employees' off-duty conduct before examining "lifestyle protection" statutes passed in three states. The Comment's focus then shifts to California law in Part IV, which first discusses California Labor Code sections 96(k) and 98.6 and the California Courts of Appeal's consistent interpretation of them as merely procedural guarantees. The next section of Part IV discusses the tort of wrongful termination in violation of public policy as applied in California. The final section of Part IV examines cases applying California's constitutional right of privacy in the employment context. Finally, Part V discusses how recognizing the constitutional right of privacy's protection of intimate association as a public policy basis for wrongful termination claims would impact

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11. See *infra* Part III.B (discussing "lifestyle protection" statutes in Colorado, New York, and North Dakota and concluding that none explicitly protect employees' off-duty intimate association).

12. See, e.g., *Watkins v. UPS*, 797 F. Supp. 1349, 1351-52 (S.D. Miss. 1992) (upholding termination for refusing to end a relationship with co-worker even though relationship had no impact on the workplace); *Ortiz v. L.A. Police Relief Ass'n*, 120 Cal. Rptr. 2d 670, 686 (Cal. Ct. App. 2002) (upholding termination for refusing to end an engagement to incarcerated felon because relationship might compromise safety of police officers).

13. See, e.g., *Vinson v. Superior Court*, 239 Cal. Rptr. 292, 298 (Cal. Ct. App. 1987) ("California's privacy protection . . . embraces sexual relations."); *Planned Parenthood Affiliates of Cal. v. Van De Kamp*, 226 Cal. Rptr. 361, 378 (Cal. Ct. App. 1986) (finding that "a right of substantive sexual privacy has been firmly established" under the California Constitution).

14. See *infra* Part IV.C (discussing the application of the California Constitution's privacy right in the employment context).

California's private employers. Ultimately, this Comment concludes that California should recognize a claim for wrongful termination based on lawful off-duty intimate association, which an employer could defend based on the employer's business interests.

## II. THE CONSTITUTIONAL RIGHT OF PRIVACY

### A. *The Right of Privacy Under the United States Constitution*

Nowhere in its text does the United States Constitution specifically guarantee a right of privacy. Nonetheless, forty years ago in *Griswold v. Connecticut*, the United States Supreme Court explicitly recognized privacy as a fundamental right.<sup>15</sup> Writing for the majority, Justice William Douglas noted that though the First Amendment does not explicitly guarantee a right of association, the Court has construed it to be a peripheral First Amendment right because "its existence is necessary in making the express guarantees fully meaningful."<sup>16</sup> Generalizing this construction, he stated that the Bill of Rights' textual guarantees "have penumbras, formed by emanations from those guarantees that help give them life and substance."<sup>17</sup> Under this theory, Justice Douglas found the First, Third, Fourth, Fifth, and Ninth Amendments create "zones of privacy" that, when taken together, amount to a Constitutional right of privacy.<sup>18</sup>

Applying this newly recognized right, the Court struck down a Connecticut law prohibiting use of contraceptives.<sup>19</sup> Justice Douglas found the idea that the state could intrude into childbearing decisions "repulsive to the notions of privacy surrounding the marital relationship."<sup>20</sup> This right of marital privacy, he said, deserved protection because it was fundamental to our civilization.<sup>21</sup>

Though many criticized *Griswold* at the time of its decision,<sup>22</sup> the Supreme Court significantly expanded the privacy right it recognized over the last forty

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15. 381 U.S. 479 (1965).

16. *Id.* at 483.

17. *Id.* at 484.

18. *Id.*

19. *Id.* at 485.

20. *Id.* at 485-86.

21. *Id.* at 486.

22. See, e.g., *id.* at 520-21 (Black, J., dissenting) (fearing the majority's revival of substantive due process will upset the principles of separation of powers and federalism); *id.* at 530 (Stewart, J., dissenting) ("I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9-10 (1971) (calling *Griswold* "an unprincipled decision" because it substituted the Court's own moral and ethical values for those of the community as embodied in the challenged statute); Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 252-53 (1965-1966) (criticizing Justice Douglas' use of "the peripheral-emanations-penumbra" theory to avoid the appearance of reviving substantive due process when in effect that is what *Griswold* did).

years. In *Eisenstadt v. Baird*, the Court expanded the privacy right to strike down a state law barring unmarried persons from using contraceptives.<sup>23</sup> After holding that the statute violated the Fourteenth Amendment's Equal Protection Clause,<sup>24</sup> the Court noted, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>25</sup> The right of privacy also formed the basis for the Court's invalidation of a New York law prohibiting the sale of contraceptives to persons under sixteen years of age in *Carey v. Population Services International*.<sup>26</sup>

While the use of contraceptives is no longer a controversial issue, the right of privacy has figured in major Supreme Court decisions about two issues that continue to divide American society: abortion and homosexuality. In *Roe v. Wade*, the Court struck down a Texas law forbidding abortion except when necessary to save the mother's life.<sup>27</sup> After discussing the possible bases of the privacy right,<sup>28</sup> the Court concluded that it is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>29</sup> In a later abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court stated that the personal autonomy guaranteed by the Fourteenth Amendment went beyond mere procreation decisions to encompass "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>30</sup>

Homosexual conduct has also been subject to analysis under the constitutional right of privacy. The Supreme Court first addressed the issue of the constitutionality of criminal sodomy laws in *Bowers v. Hardwick*.<sup>31</sup> Contrary to its trend of expanding the privacy right, the Court in *Bowers* held the right did not apply to homosexual activity because it had no connection to "family, marriage, or procreation."<sup>32</sup> Justice John Paul Stevens, on the other hand, thought

23. 405 U.S. 438 (1972).

24. *Id.* at 447 (finding that "no [rational] ground exists" for different treatment of married and unmarried persons under the challenged law).

25. *Id.* at 453 (emphasis omitted).

26. 431 U.S. 678, 693 (1977) ("[T]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.").

27. 410 U.S. 113 (1973).

28. It took several decisions for the Court to settle on the exact source of this right. In *Griswold*, Justice Douglas said it "emanated" from various amendments. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). In his concurring opinion in that case, Justice Goldberg found its basis in the Ninth Amendment's reservation of rights not specifically enumerated in the Constitution to the people. *Id.* at 491-92. The *Roe* Court, on the other hand, felt it was "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." *Roe*, 10 U.S. at 153. The Court appears to have settled on this latter view, as it was reiterated in both *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992) and *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

29. *Roe*, 410 U.S. at 153.

30. 505 U.S. at 851.

31. 478 U.S. 186 (1986).

32. *Id.* at 191.

the privacy right extended to “nonreproductive, sexual conduct that others may consider offensive or immoral.”<sup>33</sup> Also in dissent, Justice Harry Blackmun foreshadowed some of the sentiments the Court’s majority would express six years later in *Casey*. He wrote that privacy rights are protected “not because they contribute . . . to the general public welfare, but because they form so central a part of an individual’s life.”<sup>34</sup>

In 2003, the Supreme Court revisited the constitutionality of criminal sodomy laws in *Lawrence v. Texas*.<sup>35</sup> Justice Anthony Kennedy began his majority opinion with a recapitulation of the Court’s right of privacy decisions<sup>36</sup> before noting that criminal sodomy laws not only prohibit a particular sexual act but also “seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”<sup>37</sup> The Court then overruled *Bowers*, finding Justice Stevens’ dissenting opinion in that case to have been correct.<sup>38</sup>

Over the last forty years, the right of privacy under the Federal Constitution has grown to encompass not only personal decisions regarding marriage<sup>39</sup> and procreation,<sup>40</sup> but also those concerning sexual conduct and intimate association.<sup>41</sup> Accordingly, the right of privacy provides Americans protection for decisions and actions that are essential to defining themselves and their place in the world.<sup>42</sup>

## B. *The Right of Privacy Under the California Constitution*

Article I, section 1 of the California Constitution reads: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting

33. *Id.* at 218 (Stevens, J., dissenting).

34. *Id.* at 204 (Blackmun, J., dissenting).

35. 539 U.S. 558 (2003).

36. *See id.* at 564-66 (discussing *Griswold*, *Eisenstadt*, *Roe*, *Carey*, and *Bowers*).

37. *Id.* at 567.

38. *Id.* at 578.

39. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause”); *see also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (noting that the right to choose one’s marriage partner without state intervention is a “fundamental freedom” protected by the Fourteenth Amendment’s Due Process Clause).

40. *See Roe v. Wade*, 410 U.S. 113, 154 (1973) (“[T]he right of personal privacy includes the abortion decision.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending that right to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing the right of married persons to make decisions regarding procreation without governmental interference).

41. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (noting intimate association is merely a part of the choice to engage in personal relationships protected by the Constitution); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“[T]he most intimate and personal choices a person may make . . . are central to the liberty protected by the Fourteenth Amendment.”).

42. *See Bowers v. Hardwick*, 478 U.S. 186, 205 (Blackmun, J., dissenting) (asserting that “intimate sexual relationships” deserve Constitutional protection because individuals use them as a means of defining themselves).

property, and pursuing and obtaining safety, happiness, and privacy.”<sup>43</sup> The words “and privacy” were added to section 1 in 1972, when California voters approved Proposition 11, the Privacy Initiative.<sup>44</sup> Though similar in some respects to its federal counterpart, the California constitutional right of privacy differs in three significant ways.

The first and most obvious difference between the federal and California rights of privacy is that the latter is enumerated clearly in the state constitution’s text.<sup>45</sup> Critics of the Supreme Court’s recognition of the federal right often cite its lack of textual basis as a substantial, if not fatal, flaw.<sup>46</sup> By explicitly granting the privacy right in the state constitution, the voters of California spared the state right from similar criticism.

The second significant difference lies in the type of actor against whom the right can be enforced. The federal right, grounded in the Due Process Clause of the Fourteenth Amendment, may only be enforced against state actors.<sup>47</sup> The state right, in contrast, is “self-executing”<sup>48</sup> and thus provides a cause of action against not just a government entity, but also against a private party.<sup>49</sup>

43. CAL. CONST. art. I, § 1.

44. *Hill v. NCAA*, 865 P.2d 633, 641 (Cal. 1994).

45. CAL. CONST. art. I, § 1 (listing among the inalienable rights of all Californians “pursuing and obtaining safety, happiness, and *privacy*”) (emphasis added).

46. See *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting) (“I can find no such general right of privacy in the Bill of Rights [or] in any other part of the Constitution.”); Bork, *supra* note 22, at 8-9 (asserting that Justice Douglas’ recognition of “zones of privacy” created by the first eight amendments was “a miracle of transubstantiation” and calling the creation of an independent right of privacy from those zones a “leap”); Kauper, *supra* note 22, at 252-53 (concluding Justice Douglas’ majority opinion was “ambiguous and uncertain in its use of the specifics of the Bill of Rights”).

47. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (“It is settled now . . . that the Constitution *places limits on a State’s right* to interfere with a person’s most basic decisions about family and parenthood.”) (emphasis added); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (declaring the Court’s view that the “right of privacy [is] founded in the Fourteenth Amendment’s concept of personal liberty and *restrictions upon state action*”) (emphasis added); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1 n.1 (2d ed. 1988) (“The Fourteenth Amendment due process and equal protection clauses limit only state action.”).

48. *Porten v. Univ. of S.F.*, 134 Cal. Rptr. 839, 842 (Cal. Ct. App. 1976); *accord Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (Cal. Ct. App. 1989); *Miller v. NBC*, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986); *Cutter v. Brownbridge*, 228 Cal. Rptr. 545 (Cal. Ct. App. 1986); *Kinsey v. Macur*, 165 Cal. Rptr. 608 (Cal. Ct. App. 1980). But see J. Clark Kelso, *California’s Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 433-34 (1992) (arguing that the privacy right does not apply to private action because, in its analysis of the legislative history of the Privacy Initiative in *White v. Davis*, 533 P.2d 222 (Cal. 1975), the California Supreme Court erroneously ignored legislative precursors to the initiative that clearly limited the right to protection from governmental action). The California Supreme Court adopted the *Porten* rule in *Hill*, 865 P.2d at 644.

49. *Hill*, 865 P.2d at 644. In its opinion, the California Supreme Court undertook a detailed analysis of the ballot argument for Proposition 11 to determine whether the privacy right could be enforced against private actors. *Id.* From the argument’s many references to activities of “government and business,” the court concluded the initiative’s framers, and thus the voters who approved it, intended for it to apply to both government and private actors. *Id.* (emphasis in original). The court then stated that to rule against this intent “would amount to an electoral ‘bait and switch.’” *Id.* Moreover, the court noted that “[a]ny expectations of privacy would indeed be illusory if only the government’s collection and retention of data were restricted.” *Id.* at 643.



Finally, the scope of the California privacy right is generally broader than that of the federal right.<sup>50</sup> Interestingly, while the federal right arose in response to state intrusions on marital and parental decisions,<sup>51</sup> the California right initially concerned protecting citizens from the increasing ability of governmental and private entities to collect data about them.<sup>52</sup> Even so, since 1972, California courts have expanded the privacy right to include protection of marital, sexual, and reproductive decisions,<sup>53</sup> generally following the United States Supreme Court's post-*Griswold* cases<sup>54</sup> in protecting "autonomy privacy."<sup>55</sup> There has been an exception to this trend in the area of reproductive rights, where the California courts have afforded more protection for abortion under the state privacy right than exists under federal law, most notably by extending the right of sexual privacy to "mature" minors<sup>56</sup> and striking down a state law requiring parental consent before a minor may have an abortion.<sup>57</sup>

On the other hand, despite ubiquitous statements about the greater breadth of the state right,<sup>58</sup> California courts have not explicitly expanded the privacy right

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50. See *Planned Parenthood Affiliates of Cal. v. Van De Kamp*, 226 Cal. Rptr. 361, 378 (Cal. Ct. App. 1986) ("The California Supreme Court has declared the state constitutional [privacy] right to be much broader than the privacy rights guaranteed by the federal Constitution."); *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 796 (Cal. 1981) ("[T]he federal right of privacy . . . is more limited than the corresponding right in the California Constitution."); *Wilson v. Cal. Health Facilities Comm'n*, 167 Cal. Rptr. 801, 805 (Cal. Ct. App. 1980) ("The inalienable right of privacy guaranteed by article I, section 1 of the State Constitution protects a larger zone in the area of financial and personal affairs than the federal right.").

51. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that the right of privacy is the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding the idea of "allow[ing] the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives" to be "repulsive to the notions of privacy surrounding the marriage relationship").

52. See *White v. Davis*, 533 P.2d 222, 233 (Cal. 1975) ("[T]he moving force behind the new constitutional provision was a more [focused] privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society."); see also *Hill*, 865 P.2d at 654 (interpreting *White* as finding "[i]nformational privacy [to be] the core value furthered by the Privacy Initiative").

53. See *Vinson v. Superior Court*, 239 Cal. Rptr. 292, 298 (Cal. Ct. App. 1987) ("California's privacy protection . . . embraces sexual relations."); *Van De Kamp*, 226 Cal. Rptr. at 378 (finding "a right of substantive sexual privacy has been firmly established" under the California Constitution); *Myers*, 625 P.2d at 796 (finding "a woman's right of procreative choice [is] an aspect of the right of privacy" under the California Constitution).

54. See *Hill*, 865 P.2d at 650 ("The [United States] Supreme Court has included within the post-*Griswold* implicit right to privacy 'certain rights of freedom of choice in marital, sexual, and reproductive matters.'").

55. See *id.* at 654 (reasoning that because "[t]he ballot arguments [for Proposition 11] refer[red] to the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference, . . . [a]utonomy privacy is also a concern of the Privacy Initiative").

56. *Van De Kamp*, 226 Cal. Rptr. 361.

57. *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997).

58. See, e.g., *id.* at 808 ("[P]ast California cases establish that, in many contexts, the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts."); *Chico Feminist Women's Health Ctr. v. Scully*, 256 Cal. Rptr. 194, 199 (Cal. Ct. App. 1989) ("Our state privacy guarantee is broader than the federal privacy right."); *Wilson v. Cal. Health Facilities Comm'n*, 167 Cal. Rptr. 801, 805 (Cal. Ct. App. 1980).

regarding marital and sexual decisions beyond the scope granted by the Federal Constitution. Nonetheless, because it uses the federal right as a base upon which to expand,<sup>59</sup> the state privacy right appears to incorporate the enhanced protection of intimate relationships recognized in *Lawrence*.<sup>60</sup> Accordingly, the California right to privacy protects self-defining intimate association at least to the same extent as the federal Constitution.

### III. PRIVATE EMPLOYERS' REGULATION OF EMPLOYEES' OFF-DUTY INTIMATE ASSOCIATION

#### A. Case Law Developments

Private sector employees have few protections against adverse employment action based on their off-duty conduct.<sup>61</sup> The wrongful discharge cause of action, recognized by most states, including California,<sup>62</sup> provides a remedy for adverse employment actions in certain circumstances. The primary purpose of this cause of action is to promote a state's public policy by prohibiting employment actions that are contrary to it.<sup>63</sup> Employee conduct that may give rise to a wrongful discharge action falls into four categories: "(1) refusing to perform unlawful acts, (2) reporting illegal activity . . . , (3) exercising legal rights, and (4) performing public duties."<sup>64</sup> Though off-duty intimate association seems to fall within the category of exercising legal rights, courts generally refused to recognize such conduct as the basis for a wrongful discharge in violation of public policy claim.<sup>65</sup>

At the center of most wrongful discharge cases involving off-duty intimate association is the employer's anti-fraternization policy. These policies, which aim to restrict, if not prohibit, romantic and sexual relationships between

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(observing that the California constitutional right of privacy "protects a larger zone in the area of financial and personal affairs than the federal right").

59. See John C. Barker, Note, *Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions*, 19 HASTINGS CONST. L.Q. 1107, 1134-35 (1992) (explaining that "[f]ederal guarantees provide a floor below which states may not venture" but "[a]bove that floor, California courts are free . . . to define their own levels" of protection).

60. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (stating the "general rule" that the state cannot "define the meaning of [a personal] relationship or . . . set its boundaries" if there is no harm to another person or the public).

61. 1 ROTHSTEIN ET AL., *supra* note 10, § 5.12, at 711.

62. See 2 *id.* § 9.9, at 438 (listing Alabama, Florida, Georgia, Louisiana, Maine, New York, and Rhode Island as the only states that do not recognize a cause of action for wrongful discharge in violation of public policy).

63. See, e.g., *Petermann v. Int'l Bhd. of Teamsters, Local 396*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) ("[I]n order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury.").

64. 2 ROTHSTEIN, *supra* note 10, § 9.9, at 439.

65. See *id.* § 5.12, at 711 (observing that courts have "upheld the discharge of employees for dating or marrying coworkers").

employees, vary in form from written policies explicitly addressing the issue to an implied understanding that employee dating is discouraged.<sup>66</sup> Substantively, an anti-fraternization policy should balance the employer's legitimate business interests in maintaining workplace productivity and morale<sup>67</sup> (and avoiding liability for sexual harassment in cases of supervisor-subordinate relationships)<sup>68</sup> with employees' privacy rights.<sup>69</sup> However, when anti-fraternization policies are challenged in wrongful discharge suits, courts almost universally defer to the employers' judgment, giving little, if any, weight to the employees' privacy interests.<sup>70</sup> This has held true regardless of the form of the policy, whether the fraternization took place within or outside the workplace, and even when the existence of a relationship was uncertain.

A written anti-fraternization policy was the basis for an employee's termination in *Watkins v. UPS*.<sup>71</sup> UPS provided its employees with a document, which included the policy, known as the "Impartial Employment and Promotion Guide."<sup>72</sup> Watkins, a division manager, was aware of the policy when he began a romantic relationship with Helen Gable, a truck driver.<sup>73</sup> When Watkins refused to end the relationship, UPS fired him.<sup>74</sup> The district court quickly disposed of Watkins' claim that his discharge violated public policy because Mississippi had

66. See Rebecca J. Wilson, Christine Filosa & Alex Fennel, *Romantic Relationships at Work: Does Privacy Trump the Dating Police?*, 70 DEF. COUNS. J. 78, 78-79 (2003) (noting that employers "adopt prophylactic policies in an effort to avoid the potentially complicated and unsavory outcomes of office affairs and to maintain a strictly professional environment" but that "problems of implementation and enforcement" often lead them to "rely on unwritten rules").

67. See *id.* at 79 (noting "employee morale and productivity" are "two business elements that employers have a vested interest in protecting"); see also Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKELEY J. EMP. & LAB. L. 377, 385-86 (2003) (stating anti-fraternization policies "are justified by efficiency concerns," such as the fear "that the employees will pay more attention to each other than to their work").

68. See Sugarman, *supra* note 67, at 386 (noting that anti-fraternization policies are justified by employer concerns "that someone might give unfair job preferences to a romantic partner," which would lead to "sexual harassment problems and claims"); Wilson, Filosa & Fennel, *supra* note 66, at 79 (predicting that a supervisor-subordinate relationship would lead co-workers to make charges of preferential treatment, thereby "trigger[ing] a sexual harassment claim against an employer under Title VII of the Civil Rights Act").

69. See Wilson, Filosa & Fennel, *supra* note 66, at 87 ("[An anti-fraternization] policy should not intrude on employees' private affairs unreasonably and should display respect for the personal lives of employees, while also protecting the employer's interest in avoiding many of the problems that can result from these romances.").

70. See *id.* ("The privacy rights of employees typically do not prohibit employers from acting as the dating police by implementing or enforcing a policy against romantic relationships in the workplace."); see also 1 ROTHSTEIN, *supra* note 10, § 5.12, at 711 ("[C]ourts have upheld discharge of employees for dating or marrying coworkers.").

71. 797 F. Supp. 1349 (S.D. Miss. 1992).

72. *Id.* at 1351. The policy reads: "Fraternization is discouraged throughout our organization. Fraternization which includes a supervisory or management employee may be perceived as favoritism or sexual harassment. Fraternization between a supervisor or manager and an employee is not permissible [sic]. Fraternization is clearly not in the best interest of the company, the manager, or the employee." *Id.*

73. *Id.* at 1351-52.

74. *Id.* at 1352.

not yet recognized that as a basis for a cause of action.<sup>75</sup> Had the state recognized the cause of action, it is possible the district court would have allowed Watkins' claim to proceed,<sup>76</sup> but, given the trend in other jurisdictions,<sup>77</sup> it would have been highly unlikely.

Employees have not fared any better challenging implied anti-fraternization policies. J.C. Penney fired David Patton for dating a co-worker.<sup>78</sup> Though the company had "no written or unwritten policy, rule or regulation" prohibiting co-worker dating, other employees told Patton that his manager disfavored fraternization among co-workers.<sup>79</sup> Despite Patton's protests that the relationship did not affect his work performance in any way, the manager told Patton to end the relationship.<sup>80</sup> When he refused, he was fired for "unsatisfactory job performance."<sup>81</sup>

Patton based his wrongful discharge claim on his personal right of privacy,<sup>82</sup> presumably under the United States Constitution. He argued that "his fundamental, inalienable rights were compromised, put on the auction block, and made the subject of an illicit barter in that he was forced to forego these rights or purchase them with his job."<sup>83</sup> The Oregon Supreme Court rejected Patton's wrongful discharge claim on the ground that the right of privacy was only enforceable against state actors.<sup>84</sup> As a result, the court concluded that Oregon's private employers "can fire an employee because of dislike of the employee's personal lifestyle."<sup>85</sup>

The termination challenged in *Staats v. Ohio National Life Insurance Co.*<sup>86</sup> apparently was motivated by the employer's disapproval of extramarital affairs. Staats attended Ohio National's "Council of Honor Convention" with a woman whom he presented as his wife, even though she was not.<sup>87</sup> Ohio National terminated him for this action despite Staats' claim that his employer allowed its employees to "engage in open extramarital relationships with impunity."<sup>88</sup> Though recognizing freedom of association as "an important social right, and one that ordinarily should not dictate employment decisions," the district court held

75. *Id.* at 1358.

76. *See id.* at 1351 (reporting UPS had moved for summary judgment).

77. *See* 1 ROTHSTEIN, *supra* note 10, § 5.12, at 711 (noting that in most cases "courts have upheld the discharge of employees for dating or marrying coworkers").

78. *Patton v. J.C. Penney Co.*, 719 P.2d 854, 856 (Or. 1986).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 857.

83. *Id.*

84. *Id.*

85. *Id.*

86. 620 F. Supp. 118 (W.D. Pa. 1985).

87. *Id.* at 119-20.

88. *Id.* at 119.

that the right to fire an employee for “‘associat[ing] with’ a non-spouse” at a company function did not threaten any recognized public policy.<sup>89</sup> It seems clear, given the decisions in *Watkins*, *Patton*, and *Staats*, that a private employer is free to impose its own moral views on employees by threat of termination for “immoral” intimate association or, at the very least, can use termination to avoid the potential inconvenience or embarrassment that such conduct may cause.<sup>90</sup>

Perhaps because many workplace romances lead to marriage,<sup>91</sup> courts have been no more accepting of marital relationships as a basis for wrongful termination claims. Patricia McCluskey claimed she was terminated “solely because she married a co-worker.”<sup>92</sup> She based her wrongful termination claim on Illinois’ stated policy of “strengthen[ing] and preserv[ing] the integrity of marriage.”<sup>93</sup> In dismissing McCluskey’s claim, the Illinois Appellate Court held that although the fundamental right of privacy protects “personal decisions relating to marriage,” the employer’s anti-fraternization policy did not violate that right because it was “a reasonable regulation that [did] not significantly interfere with decisions to enter the marital relationship.”<sup>94</sup> Thus, the employer’s interest in avoiding workplace problems trumped not only the employee’s privacy interest but also the state’s declared interest in promoting the institution of marriage.

Courts have even found in favor of employers when the existence of a romantic relationship between co-workers was in dispute. In *Born v. Blockbuster Videos, Inc.*,<sup>95</sup> two employees were fired for allegedly violating the employer’s policy prohibiting “dating between supervisors/managers and their subordinates” despite their denial of a romantic involvement.<sup>96</sup> The federal district court held that because no Iowa statute granted the employees a privacy right, it could not serve as the basis for their wrongful discharge claim.<sup>97</sup> Likewise, in *Grzyb v. Evans*,<sup>98</sup> the Kentucky Supreme Court upheld Evans’ termination for conversing

89. *Id.* at 120.

90. See 1 ROTHSTEIN, *supra* note 10, § 5.12, at 711 (observing that employers are “largely free to impose whatever standards of conduct or discipline they choose”).

91. See Minarek, *supra* note 4 (citing the 2003 AMA survey which shows that for more than half of the respondents, their workplace romances “led to marriage or a long-term relationship”); Wilson, Filosa & Fennel, *supra* note 66, at 78-79 (citing a 1998 Society for Human Resource Management survey which predicted that “55 percent of office romances would likely result in marriage”).

92. *McCluskey v. Clark Oil & Refining Corp.*, 498 N.E.2d 559 (Ill. App. Ct. 1986).

93. *Id.* at 561 (quoting the Illinois Marriage and Dissolution of Marriage Act, 40 ILL. COMP. STAT. ANN. § 102(2) (West 1985)).

94. *Id.*

95. 941 F. Supp. 868 (S.D. Iowa 1996).

96. *Id.* at 869.

97. See *id.* (declining “to recognize a public policy exception to the employment at-will doctrine based on the common law tort of invasion of privacy by a private person”).

98. 700 S.W.2d 399 (Ky. 1985).

with a female co-worker<sup>99</sup> because it found no constitutional provision or statute guaranteeing Evans' freedom of association with her.<sup>100</sup>

Given the difficulty employees have faced in even getting their wrongful discharge claims to trial,<sup>101</sup> it is not surprising that there have been few cases decided in their favor. Perhaps the best known of these is a California case, *Rulon-Miller v. IBM Corp.*<sup>102</sup> IBM terminated Virginia Rulon-Miller for dating a competitor's employee, Matt Blum.<sup>103</sup> The relationship, which began when both were employed by IBM, was well known to many within the company, including Rulon-Miller's superiors.<sup>104</sup> Despite this knowledge and the fact that Rulon-Miller's performance was above standard, IBM terminated her because the relationship constituted a "conflict of interest."<sup>105</sup> IBM's conflict of interest policy prohibited outside employment that conflicted "with IBM's business interests."<sup>106</sup> However, it made no mention of personal relationships with competitors.<sup>107</sup> In fact, IBM had a company policy that an employee had a "right to hold a job even though 'off-the-job behavior' might not be approved of by the employee's manager."<sup>108</sup>

Though the First District Court of Appeal acknowledged that the California constitutional right to privacy "could be implicated by the IBM inquiry,"<sup>109</sup> its decision was based largely on contract principles. The court found that IBM's policy of not basing adverse employment action on "outside activities" unless it created a conflict of interest or disruption of job effectiveness<sup>110</sup> may have created an implied term in its employees' employment contracts.<sup>111</sup> Violation of that term

99. *Id.* at 400.

100. *Id.* at 401-02.

101. See, e.g., *Watkins v. UPS*, 797 F. Supp. 1349, 1362 (S.D. Miss. 1992) (granting the employer's motion for summary judgment); *McCluskey v. Clark Oil & Refining Corp.*, 498 N.E.2d 559, 562 (Ill. App. Ct. 1986) (reversing the trial court's denial of employer's motion to dismiss wrongful discharge claim); *Patton v. J.C. Penney Co.*, 719 P.2d 854, 857 (Or. 1986) (affirming the dismissal of a wrongful discharge claim); *Staats v. Ohio Nat'l Life Ins. Co.*, 620 F. Supp. 118, 119 (W.D. Pa. 1985) (dismissing a wrongful discharge claim); *Born*, 941 F. Supp. at 872 (granting the employer's motion to dismiss wrongful discharge claim); *Grzyb*, 700 S.W.2d at 402 (upholding the trial court's dismissal of a wrongful discharge claim for failing to state a cause of action).

102. 208 Cal. Rptr. 524 (Cal. Ct. App. 1984).

103. *Id.* at 528.

104. *Id.*

105. *Id.*

106. *Id.* at 530-31.

107. See *id.* at 531 (stating "IBM did not interpret this policy to prohibit a romantic relationship" with a competitor's employee).

108. *Id.* at 530.

109. *Id.*

110. See *id.* ("When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal." (quoting a memorandum signed by former IBM chairman Tom Watson, Jr.)). Later in the memo, Watson wrote: "Action should be taken only when a legitimate interest of the company is injured or jeopardized." *Id.*

111. See *id.* at 529 (stating that whether Rulon-Miller "could reasonably rely on [IBM's] policies [regarding off-duty conduct] for job protection" was a "threshold inquiry").

would subject IBM to liability for breach of contract.<sup>112</sup> Because Rulon-Miller did not have access “to sensitive information which could have been useful to competitors,” the jury, according to the court of appeal, correctly found no conflict of interest in her relationship with Blum.<sup>113</sup> Accordingly, IBM breached its employment contract with Rulon-Miller by firing her based on that relationship.<sup>114</sup>

In the larger scheme of wrongful discharge cases, *Rulon-Miller* has proved anomalous, primarily because of its basis in contract law, rather than tort law. Very few employers have a policy like IBM’s, which explicitly prohibits termination based on outside conduct. Moreover, given the decision in that case, few are likely to adopt one because it will expose them to liability for breach of contract. Thus, in most states, the wrongful discharge cause of action remains the only remedy for termination based on an employee’s off-duty intimate association. However, as demonstrated by the foregoing examples, this tort action provides almost no protection for employees because most states, including California, refuse to recognize a public policy to protect such conduct.

## B. State “Lifestyle Protection” Statutes

Three states, Colorado, New York, and North Dakota, have enacted “lifestyle protection” statutes forbidding adverse employment decisions based on employees’ off-duty conduct.<sup>115</sup> Because protection of off-duty intimate association varies under each of these statutes, they are discussed separately by state.

### 1. Colorado

Under Colorado’s “lifestyle protection” statute, it is unlawful “for an employer to terminate any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours.”<sup>116</sup> The statute provides exceptions when the prohibition of particular off-duty conduct is “rationally related to the employment activities and responsibilities of a particular employee”<sup>117</sup> or is “necessary to avoid a conflict of interest with any

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112. See *id.* (observing that any action by IBM contrary to Rulon-Miller’s reasonable reliance on company policy “would constitute a violation of her contract rights”).

113. *Id.* at 531.

114. See *id.* at 532 (noting that Rulon-Miller’s “right to be free of inquiries concerning her personal life was based on substantive direct contract rights she had flowing to her from IBM policies”); Marisa Anne Pagnattaro, *What Do You Do When You Are Not At Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 651 (2004) (“Because of the protection extended by IBM’s policy [regarding off-duty conduct], Rulon-Miller prevailed on her claim for wrongful discharge.”).

115. Sugarman, *supra* note 67, at 416.

116. COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2004).

117. *Id.* § 24-34-402.5(1)(a).

responsibilities to the employer or the appearance of such a conflict of interest.”<sup>118</sup>

As of 2004, only one case, *Borquez v. Robert C. Ozer, P.C.*,<sup>119</sup> had addressed this statute in relation to off-duty intimate association. On February 19, 1992, Robert Borquez learned his male partner had been diagnosed with AIDS.<sup>120</sup> Borquez immediately told his employer about this relationship as well as his need for AIDS testing.<sup>121</sup> One week later, Borquez was fired.<sup>122</sup>

Borquez based his wrongful discharge claim on both the Colorado “lifestyle protection” statute and a Denver ordinance prohibiting discrimination based on sexual orientation.<sup>123</sup> At trial the parties agreed to combine the claims into the single issue of whether Borquez was fired because he was gay.<sup>124</sup> Accordingly, the jury was not specifically instructed on the statutory requirement that the discharge be based on Borquez’s off-duty activities<sup>125</sup> and thus made no findings on that fact.

On appeal, the Colorado Court of Appeals rejected the appellant’s assertion that the verdict was based solely on Borquez’s status as a homosexual because the jury was not instructed on the requirements of the “lifestyle protection” statute.<sup>126</sup> Instead, the court found the jury was presented with sufficient evidence, particularly Ozer’s testimony that he considered homosexual conduct “improper,” to find that Borquez’s discharge violated the statute.<sup>127</sup> Two years later, the Colorado Supreme Court held the appellate court’s reliance on the “lifestyle protection” statute to support the jury verdict was erroneous.<sup>128</sup> The court stated that any jury instruction for the statute must necessarily require a finding that the discharged employee engaged in lawful activity away from the employer’s premises during nonworking hours.<sup>129</sup> Because the jury instruction here did not include such a requirement, the court concluded the jury was not instructed properly on the issue and thus its verdict could not support liability based on the statute.<sup>130</sup>

Because of the Colorado Supreme Court’s decision, no precedential case law currently exists interpreting the state’s “lifestyle protection” statute in the context

118. *Id.* § 24-34-402.5(1)(b).

119. 923 P.2d 166 (Colo. Ct. App. 1995) (*Borquez I*).

120. *Id.* at 170.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 170-71.

125. *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 375-76 (Colo. 1997) (*Borquez II*) (finding the trial court “did not instruct the jury pursuant to the lawful activities statute”).

126. *Borquez I*, 923 P.2d at 171.

127. *Id.*

128. *Borquez II*, 940 P.2d at 376.

129. *Id.* at 375.

130. *Id.* at 376.



of off-duty intimate association. However, the Colorado Court of Appeals' decision seems to indicate that statutory protection is broad enough to encompass even conduct that employers may consider "immoral." Accordingly, Colorado's statute appears to provide employees more protection than is available under common law wrongful discharge doctrine in other states.

## 2. North Dakota

Though its wording is similar,<sup>131</sup> North Dakota's "lifestyle protection" statute is not a stand-alone law like Colorado's but instead is included in the North Dakota Human Rights Act's provision "outlin[ing] exceptions to the employment at-will doctrine."<sup>132</sup> The provision prohibits employment discrimination based on, *inter alia*, "participation in a lawful activity off the employer's premises during nonworking hours."<sup>133</sup> However, it also provides an exception when the employee's conduct "direct[ly] conflict[s] with the essential business-related interests of the employer."<sup>134</sup> In 1993, this language replaced the original exception for activity that "was contrary to a bona fide occupational qualification that reasonably and rationally related to employment activities and the responsibilities of a particular employee,"<sup>135</sup> phrasing essentially identical to that in the Colorado statute's exception.<sup>136</sup>

Also like Colorado, North Dakota's "lifestyle protection" statute has been interpreted only once by a court in the context of off-duty intimate association. In *Hougum v. Valley Memorial Homes*,<sup>137</sup> the North Dakota Supreme Court provided some guidance regarding off-duty sexual conduct as lawful activity and as a direct conflict with an employer's interests without firmly resolving either issue.<sup>138</sup> In December 1994, David Hougum, a staff chaplain at Valley Memorial Homes (VMH), was arrested and charged with disorderly conduct for

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131. Compare N.D. CENT. CODE § 14-02.4-03 (2004) ("It is a discriminatory practice for an employer to . . . discharge an employee . . . because of . . . participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer."), with COLO. REV. STAT. ANN. § 24-34-402.5(1) (West 2004) ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . .").

132. *Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 820 (N.D. 1998).

133. N.D. CENT. CODE § 14-02.4-03 (2004).

134. *Id.*

135. *Hougum*, 574 N.W.2d at 821.

136. Compare N.D. CENT. CODE § 14-02.4-03 (1991) (quoted in text), with COLO. REV. STAT. ANN. § 24-34-402.5(1)(a) (West 2004) (providing an exception for employee conduct that "[r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee").

137. 574 N.W.2d 812.

138. See Pagnattaro, *supra* note 114, at 662 (concluding that while a genuine factual issue existed as to whether Hougum's conduct was a "direct conflict" with his employer's interests, the court should have determined whether his conduct was lawful as a matter of law).

masturbating in a Sears restroom.<sup>139</sup> A month later VMH fired Hougum “due to the Sears incident.”<sup>140</sup> The charge was dropped a week later.<sup>141</sup> Hougum sued VMH for, *inter alia*, violation of the “lifestyle protection” statute.<sup>142</sup> The trial court granted summary judgment for VMH on all claims.<sup>143</sup>

In discussing Hougum’s Human Rights Act claim, the North Dakota Supreme Court observed that state’s law prohibits masturbation “in a public place.”<sup>144</sup> But it also recognized that an enclosed restroom stall might be public or private depending on the actor’s reasonable expectation that his conduct would be seen by others.<sup>145</sup> Because that factual determination could not be made on the existing record, the court refused to decide whether “Hougum’s conduct in the Sears restroom constituted either lawful or unlawful activity.”<sup>146</sup> Moreover, because the potential “business and economic conflicts of interest” between Hougum’s off-duty conduct and VMH’s business were not of the right type, the court declined to hold that Hougum’s alleged loss of effectiveness with VMH’s residents was sufficient to constitute a “direct conflict” under the statute’s exception.<sup>147</sup>

Because of the North Dakota Supreme Court’s refusal to decide these issues, it is unclear what constitutes “lawful activity” or “direct conflict” under the state’s lifestyle protection statute. Nonetheless, the court appeared to say that the statute protects all off-duty lawful sexual activity that does not affect the employer’s “essential business related interests.”<sup>148</sup> It apparently rejected the idea that an employer’s mere disapproval of, or embarrassment resulting from, the employee’s off-duty conduct is sufficient to support termination under the statute’s “direct conflict” exception.<sup>149</sup> Thus, as in Colorado, North Dakota employees apparently receive more protection for their off-duty intimate association than employees in states without “lifestyle protection” statutes.

139. *Hougum*, 574 N.W.2d at 815.

140. *Id.*

141. *See id.* (“[The] charge was dismissed with prejudice on January 25, 1995.”).

142. *See id.* (“Hougum . . . sued VMH for violation of the North Dakota Human Rights Act, wrongful termination, breach of contract, and intentional and negligent infliction of emotional distress.”).

143. *Id.*

144. *Id.* at 821.

145. *See id.* at 822 (discussing how some jurisdictions define a public place by whether “the actor might reasonably expect conduct [in that place] to be seen by others”).

146. *Id.*

147. *Id.*

148. *See id.* at 821 (stating that the statute was enacted to “preclude employers from inquiring into an employee’s non-work conduct, including an employee’s weight and smoking, marital, or *sexual habits*” and that the 1993 amendments merely seek to protect employers when the employee’s off-duty conduct is “deleterious to the well-being of the employer’s mission”) (emphasis added).

149. *See id.* at 822 (finding the “potential conflicts raised by VMH” were different from those arising when an employee’s off-duty business conflicts with that of his employer).

### 3. New York

New York's "lifestyle protection" statute differs from those of Colorado and North Dakota in two significant ways. First, the New York law's scope is much narrower than those of the other two states.<sup>150</sup> Second, New York case law explicitly addressed whether the statute protects off-duty intimate association.<sup>151</sup>

New York's "lifestyle protection" statute makes it unlawful for an employer to discharge an employee based on the employee's off-duty political activities, off-duty consumption of legal products, off-duty legal recreational activities, or union membership.<sup>152</sup> "Recreational activities" are defined as "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."<sup>153</sup> All of the cases under this statute involving employees' off-duty intimate association have argued that such conduct falls within the definition of "recreational activity."<sup>154</sup>

The first case to address the issue of off-duty intimate association under the statute, *State v. Wal-Mart Stores, Inc.*,<sup>155</sup> was brought by the New York Attorney General on behalf of two employees discharged for violating Wal-Mart's anti-fraternization policy.<sup>156</sup> That policy prohibited a "dating relationship" between a married employee and a co-worker who is not his or her spouse.<sup>157</sup> The Appellate Division of the Supreme Court held that because none of the recreational activities listed in the statute necessarily involved romance, the Legislature did not intend to include intimate relationships within its scope of protection.<sup>158</sup> In dissent, Justice Yesawich concluded that dating must fall within "recreational activity" because otherwise only social relationships without a romantic component would be protected from employer regulation.<sup>159</sup>

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150. See Sugarman, *supra* note 67, at 417 (noting that while Colorado and North Dakota "have adopted sweeping provisions" prohibiting employment discrimination based on off-duty conduct, New York's statute "lists four broad categories of off-duty conduct that employers generally may not use in making employment decisions").

151. See *id.* (observing that the first two reported cases interpreting New York's law involved "personal relationships—i.e. dating"); Pagnattaro, *supra* note 114, at 654 (noting most of the cases "interpreting the scope of [New York's "lifestyle protection" statute] . . . pertain to an employee's off-duty personal relationships").

152. N.Y. LAB. LAW § 201-d(2) (McKinney 2002).

153. *Id.* § 201-d(1)(b).

154. See Pagnattaro, *supra* note 114, at 654 (noting that cases "pertain[ing] to an employee's off-duty personal relationships" have been based on "the scope of 'legal recreational activities'" under section 201-d); Sugarman, *supra* note 67, at 417 (reporting that employees in the first two cases filed under section 201-d and "cleverly argued that dating is a recreational activity and should therefore be covered by the New York law").

155. 621 N.Y.S.2d 151, 158 (N.Y. App. Div. 1995).

156. *Id.* at 151; see Pagnattaro, *supra* note 114, at 654-55 (noting the original action in the Wal-Mart case was brought by the New York Attorney General on behalf of the employees).

157. *Wal-Mart*, 621 N.Y.S.2d 151, 151.

158. *Id.* at 152.

159. *Id.* at 153 (Yesawich, J., dissenting).

This broader view was adopted by the United States District Court for the Southern District of New York in *Pasch v. Katz Media Corp.*<sup>160</sup> Katz demoted Judy Pasch two days after her live-in boyfriend, Mark Braunstein, was fired from his position as vice-president with the company.<sup>161</sup> Pasch argued the sole basis for the demotion was her continuing relationship with Braunstein and that this constituted constructive discharge in violation of New York's "lifestyle protection" statute.<sup>162</sup> In reaching a different conclusion than the *Wal-Mart* court, the district court found that both the statute's legislative sponsors and then-Governor Mario Cuomo intended the statute to apply to all off-duty conduct that does not create "a material conflict of interest with the employer's business interests."<sup>163</sup> Accordingly, the court concluded that cohabitation that does not create such a conflict is protected under the "recreational activities" category of the statute.<sup>164</sup> Three years later, the same district court held that "a close personal friendship is analogous to co-habitation" and is thus also protected under New York's "lifestyle protection" statute.<sup>165</sup>

These cases were soon overruled by the United States Court of Appeals for the Second Circuit in *McCavitt v. Swiss Reinsurance America Corp.*<sup>166</sup> In his complaint, Jess McCavitt alleged termination in violation of New York's "lifestyle protection" statute for dating a fellow Swiss Re officer, Diane Butler, even though the relationship had no negative effect on either party's work performance.<sup>167</sup> Finding no "persuasive evidence" that the New York Court of Appeals would rule otherwise, the Second Circuit held it was bound to follow the Appellate Division's decision in *Wal-Mart* that "romantic dating is not a protected 'recreational activity' under the statute."<sup>168</sup> Concurring "grudgingly" in the decision,<sup>169</sup> Judge McLaughlin opined that "[i]t is repugnant to our most basic ideals in a free society that an employer can destroy an individual's livelihood on the basis of whom he is courting, without first having to establish that the employee's relationship is adversely affecting the employer's business interests."<sup>170</sup> For this reason, he hoped the New York Court of Appeals would find intimate association protected under the statute if given the opportunity.<sup>171</sup>

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160. No. 94 Civ. 8554 (RPP), 1995 WL 469710 (S.D.N.Y. Aug. 8, 1995).

161. *Id.* at \*1.

162. *Id.* at \*1-2.

163. *Id.* at \*3.

164. *Id.*

165. *Aquilone v. Republic Nat'l Bank of N.Y.*, No. 98 Civ. 5451 (SAS), 1998 WL 872425, at \*6 (S.D.N.Y. Dec. 15, 1998).

166. 237 F.3d 166 (2d Cir. 2001).

167. *Id.* at 166-67.

168. *Id.* at 168.

169. *Id.* at 169 (McLaughlin, J., concurring).

170. *Id.* at 170.

171. *Id.*

In sum, state “lifestyle protection” statutes do not clearly protect employees from adverse employment decisions based on their off-duty intimate association. None of the three statutes explicitly safeguards such activity.<sup>172</sup> Though both the Colorado and North Dakota Supreme Courts recognize that their state’s statute might apply to off-duty intimate association, neither has held so unequivocally.<sup>173</sup> The New York Court of Appeals has not weighed in on that state’s “lifestyle protection” statute<sup>174</sup> but lower state courts,<sup>175</sup> as well as the Second Circuit,<sup>176</sup> have held that it does not apply to “romantic dating.” Accordingly, “lifestyle protection” statutes, as they currently exist in the three states that have enacted them, do not adequately protect employees’ privacy interests in their off-duty intimate associations.

#### IV. CALIFORNIA LAW

##### A. Labor Code Sections 96(k) and 98.6

Section 96 of the California Labor Code allows the Labor Commissioner to take assignment of specified types of employee claims against employers.<sup>177</sup> Subsection (k), added by the California Legislature in 1999,<sup>178</sup> provides for assignment of employee “[c]laims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.”<sup>179</sup> Finding “that allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties, regardless of the rationale offered, is not in the public interest,” the Legislature declared this subsection “necessary to further the state interest in protecting the civil rights of individual employees who would not otherwise be able to protect themselves.”<sup>180</sup>

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172. See COLO. REV. STAT. ANN. § 24-34-402.5(1)(a) (West 2004) (prohibiting termination for “any lawful activity” engaged in off the employer’s premises during nonworking hours); N.D. CENT. CODE § 14-02.4-03 (2004); N.Y. LAB. LAW § 201-d(2) (McKinney 2002) (prohibiting termination based on “legal recreational activities” engaged in off the employer’s premises during non-working hours).

173. See *Hougum v. Valley Mem’l Homes*, 574 N.W.2d 812, 822 (N.D. 1998) (holding plaintiff “raised a disputed factual issue about whether his conduct was not forbidden by law and therefore may fit within the protected status of lawful activity off the employer’s premises”); *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 376 (Colo. 1997) (holding that Colorado’s “lawful activities” statute could not support liability for plaintiff’s discharge because the jury was not instructed on it).

174. *McCavitt v. Swiss Reinsurance Am. Corp.*, 237 F.3d 166, 167 (2d Cir. 2001).

175. *New York v. Wal-Mart Stores, Inc.*, 621 N.Y.S.2d 151, 152 (N.Y. App. Div. 1995); *Hudson v. Goldman Sachs & Co.*, 725 N.Y.S.2d 318, 319 (N.Y. App. Div. 2001); *Bilquin v. Roman Catholic Church*, 729 N.Y.S.2d 519 (N.Y. App. Div. 2001).

176. *McCavitt*, 237 F.3d at 168.

177. CAL. LAB. CODE § 96 (West 2003).

178. See 1999 Cal. Stat. ch. 692 (enacting CAL. LAB. CODE § 96(k)).

179. CAL. LAB. CODE § 96(k).

180. 1999 Cal. Stat. ch. 692, § 1.

Section 96(k) caused immediate concern among employers' counsel, many of whom read the statutory text quite broadly.<sup>181</sup> For example, a 2000 Employment Law Newsletter from the Continuing Education Division of the California Bar Association said that "if interpreted literally, this statute could result in administrative awards of back pay anytime an employer suspends, demotes, or terminates an employee for anything done outside of work that is not expressly illegal—no matter how it affects the employer or its customers."<sup>182</sup> Others observed that the text was broad enough to encompass off-duty activities traditionally subject to employer regulation, such as moonlighting<sup>183</sup> and employee fraternization.<sup>184</sup> In the end, however, most concluded that section 96(k)'s language was unclear<sup>185</sup> and therefore other sources of interpretation must be consulted to determine its intended meaning.

Many early commentators looked to "lifestyle protection" statutes passed by other states. Comparing section 96(k) to statutes on the books in Colorado, New York, and North Dakota,<sup>186</sup> they generally agreed that California's "version" was much broader.<sup>187</sup> More specifically, commentators noted section 96(k), unlike the other statutes, applies to demotions and suspensions rather than just terminations<sup>188</sup> and has no exception for conduct that creates a conflict of interest

181. E.g., Thelen, Reid, & Priest, LLP, *Thelen Reid Report No. 63*, June 18, 2002, <http://www.thelenreid.com/articles/report/rep63.htm> [hereinafter *Thelen Reid Report*] (on file with the *McGeorge Law Review*) ("Although it appears that the goal of the Legislature was to protect civil rights, the actual text of the amendment is much broader."); Mike Sullivan & Denise Nash, *Labor Code Section 96(k): A Necessary Protection for Employees or a Legislative Blunder?*, CASE 'N POINT, [http://www.ceb.com/newsletter/v1/employment\\_law.htm](http://www.ceb.com/newsletter/v1/employment_law.htm) (last visited Feb. 2, 2005) (on file with the *McGeorge Law Review*) (describing section 96(k)'s language as "broad" and "unqualified").

182. Sullivan & Nash, *supra* note 181.

183. E.g., *Thelen Reid Report*, *supra* note 181 ("[A] Deputy Labor Commissioner stated that he would find a violation of Section 96(k) if an employee was fired for moonlighting during hours when the employee was not otherwise required to be at work for the employer."); *California Labor Code Section 96(k): Can Employers Still Discipline Employees for Violating Company Policies Regarding Off-Duty Conduct*, MORRISON & FOERSTER NEWS, Apr. 2001, available at <http://www.mofo.com/news> (on file with the *McGeorge Law Review*) (noting "moonlighting for a competitor" may be protected under section 96(k)).

184. See, e.g., Sullivan & Nash, *supra* note 181 (observing that section 96(k) directly conflicts with California case law upholding termination for "violating an employer's anti-fraternization policies"); *Thelen Reid Report*, *supra* note 181 (describing "enforcement of nonfraternization policies" as one of the "potential problem areas" under section 96(k)).

185. MORRISON & FOERSTER NEWS, *supra* note 183 ("[T]he plain language of subdivision (k) appears much broader than the Attorney General's [narrower] interpretation."); *Thelen Reid Report*, *supra* note 181 (stating section 96(k) is "unclear" about what "nonworking hours" and "away from the employer's premises" mean); Sullivan & Nash, *supra* note 181 (calling section 96(k)'s text "broad, unqualified language").

186. See *supra* Part III.B (discussing Colorado, North Dakota, and New York "lifestyle protection" statutes).

187. E.g., MORRISON & FOERSTER NEWS, *supra* note 183 (observing that "[o]n its face, California's statute is broader" than those of other states); *Thelen Reid Report*, *supra* note 181 (noting that other states' laws "differ in that they have provided explicit exceptions to their otherwise broad laws").

188. See *id.* ("California's statute is more strict than the statutes enacted in Colorado and New York as it covers demotions and suspensions as well as terminations."); MORRISON & FOERSTER NEWS, *supra* note 183 ("California's statute is broader than Colorado's because it covers employment actions that include demotions and suspensions, not just terminations.").

with the employer's business.<sup>189</sup> Subsequent legal commentaries have included section 96(k) in discussions of state "lifestyle protection" statutes,<sup>190</sup> similarly noting its much broader scope in comparison to statutes of other states.

The other interpretive source cited by early commentators was an October 2000 Opinion of the California Attorney General.<sup>191</sup> This Opinion specifically addressed whether section 96(k) "abrogate[d] existing law that permits the disciplining of police officers for off-duty conduct occurring away from their place of employment that is otherwise lawful but conflicts with their duties as peace officers."<sup>192</sup> Noting that section 96 of the California Labor Code has never "served as an original source of employee rights against employers," the Attorney General found that subsection (k) did not allow the Labor Commissioner to assert claims on behalf of peace officers for employment action based on lawful but "incompatible" off-duty conduct because those claims were not cognizable under existing California law.<sup>193</sup> Based on statutory construction and legislative history, the Attorney General concluded that section 96(k) "did not create new substantive rights for employees" but instead merely "established a procedural mechanism that allows the Commissioner to assert, on behalf of employees, their independently recognized constitutional rights."<sup>194</sup>

After an initial unreported decision to the contrary,<sup>195</sup> the California Courts of Appeal consistently adopted the Attorney General's "procedure only" approach to section 96(k). Because the first two of these decisions were unreported,<sup>196</sup> it was not until late 2003 that a precedential decision interpreting section 96(k) was issued, in *Barbee v. Household Automotive Finance Corp.*<sup>197</sup> Robert Barbee, head of Household Automotive Finance's sales force was fired for continuing an

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189. See *id.* (asserting section 96(k), unlike statutes in Colorado and New York, prohibits employment action based on lawful off-duty conduct "regardless of whether it creates a conflict of interest or otherwise affects an employer's legitimate business interests"); Sullivan & Nash, *supra* note 181 (noting section 96(k), unlike Colorado's and New York's statutes, lacks a specific exclusion for employers' conflict of interest policies).

190. E.g., Jason Bosch, Note, *None of Your Business (Interest): The Argument for Protecting All Employee Behavior with No Business Impact*, 76 S. CAL. L. REV. 639, 654-57 (2003) (including section 96(k) in "Lifestyle Protection Statutes" section); Pagnattaro, *supra* note 114, at 646-52 (discussing section 96(k) in a section entitled "State Statutory Protection of Off-Duty Conduct").

191. See MORRISON & FOERSTER NEWS, *supra* note 183 (identifying the Attorney General's 2000 Opinion as a "possible [source assisting] employers in determining the meaning and scope of subdivision (k)"); Thelen Reid Report, *supra* note 181 (discussing the same Attorney General Opinion).

192. 83 Op. Cal. Att'y Gen. 227 (2000).

193. *Id.* at 229.

194. *Id.* at 230.

195. See *Tavani v. Levi Strauss & Co.*, No. A095770, 2002 WL 31623684, at \*15 (Cal. Ct. App. Nov. 21, 2002) (assuming section 96(k) provides substantive rights but finding it inapplicable to claims for wrongful termination because, though plaintiff's conduct occurred outside the employer's premises, "it diminished Tavani's credibility and effectiveness as a manager at Levi").

196. *Paloma v. City of Newark*, No. A098022, 2003 WL 122790, at \*12 (Cal. Ct. App. Jan. 10, 2003); *Agabao v. Delta Design, Inc.*, No. D039642, 2003 WL 194950, at \*3-4 (Cal. Ct. App. Jan. 30, 2003).

197. 6 Cal. Rptr. 3d 406 (Cal. Ct. App. 2003).

intimate relationship with a subordinate sales force member, Melanie Tomita.<sup>198</sup> Barbee argued that section 96(k), and in particular the uncoded findings that accompanied its enactment,<sup>199</sup> established a public policy against termination based on lawful off-duty conduct.<sup>200</sup> Consequently, Barbee contended that his termination by Household Automotive Finance was wrongful because it violated that public policy.<sup>201</sup>

The Fourth District Court of Appeal rejected Barbee's section 96(k) argument. Just as the Attorney General had done three years before, the court found that Labor Code section 96 does not "describe any public policies," but rather, "simply outlines the types of claims over which the Labor Commissioner shall exercise jurisdiction."<sup>202</sup> Accordingly, "subsection (k) does not create any new public policies;" it merely "authorizes the Labor Commissioner to vindicate existing public policies in favor of individual employees."<sup>203</sup> Based on this finding, the court held that section 96(k) did not provide an independent public policy basis for Barbee's wrongful termination in violation of public policy claim.<sup>204</sup>

Seven months after its *Barbee* decision, the Fourth District Court of Appeal, in *Grinzi v. San Diego Hospice Corp.*,<sup>205</sup> interpreted section 96(k)'s companion provision, Labor Code section 98.6, as also being merely procedural in nature. Section 98.6, enacted in 2001,<sup>206</sup> prohibits adverse employment action against an employee or applicant for engaging in "any conduct delineated in this chapter, including the conduct described in subdivision (k) of section 96" or for filing a complaint relating to the employee's or applicant's rights under the Labor Code.<sup>207</sup> Such action by an employer constitutes a misdemeanor.<sup>208</sup> As with section 96(k), the enactment of section 98.6 was accompanied by legislative findings that "working men and women are ill-equipped and unduly disadvantaged in any effort to assert their individual rights otherwise protected by the Labor Code" and thus it was "necessary and appropriate to provide employees an inexpensive administrative remedy for the pursuit of their rights under the Labor Code."<sup>209</sup>

198. *Id.* at 408-09.

199. *See id.* at 413-14. The court found the statement "allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties, regardless of the rationale offered, is not in the public interest" to mean the Labor Commissioner had appropriate authority to assert existing claims on behalf of individual employees. *Id.* (citing uncoded findings in 1999 Cal. Stat. ch. 692, § 1).

200. *Id.* at 412-14.

201. *Id.* at 412.

202. *Id.* at 413.

203. *Id.* at 414.

204. *Id.*

205. 14 Cal. Rptr. 3d 893 (Cal. Ct. App. 2004).

206. *See* 2001 Cal. Stat. ch. 820 (enacting CAL. LAB. CODE § 98.6).

207. CAL. LAB. CODE § 98.6(a) (West 2003).

208. *Id.* § 98.6(b).

209. 2001 Cal. Stat. ch. 820, § 1.



In the first (and to date only) case interpreting section 98.6, the Fourth District Court of Appeal used *Barbee* to limit the section's scope to constitutional claims. San Diego Hospice Corporation, a private employer, fired Joan Grinzi for her membership in Women's Garden Circle, "an investment group Hospice believed to be an illegal pyramid scheme."<sup>210</sup> After rejecting Grinzi's claims that both the First Amendment to the United States Constitution<sup>211</sup> and California Labor Code section 96(k)<sup>212</sup> provided public policy bases for her wrongful discharge claim, the court turned to section 98.6 as a basis for the claim. The Fourth District quickly dismissed Grinzi's assertion that section 98.6's incorporation by reference of section 96(k) created a substantive right.<sup>213</sup> Citing *Barbee*, the court noted that section 96(k) protects only "recognized constitutional rights" and thus only adverse employment actions based on the assertion of those rights are proscribed by section 98.6.<sup>214</sup> Because Grinzi failed to allege a violation of her constitutional rights, the court held that she failed to state a claim under section 98.6.<sup>215</sup>

The Fourth District's interpretation of Labor Code sections 96(k) and 98.6 is clear: both sections merely provide procedural guarantees for exercising rights already conferred by California law. To date, the California Legislature has not acted to counter this interpretation nor has another California District Court of Appeal ruled contrary to the Fourth District. Thus, assertions made soon after enactment<sup>216</sup> (and still made by some)<sup>217</sup> that these sections constituted a "lifestyle protection" statute for California similar to those in Colorado, New York, and North Dakota were apparently incorrect. Moreover, given the current climate favoring restriction of employees' legal remedies against employers,<sup>218</sup> it is

210. *Grinzi*, 14 Cal. Rptr. 3d at 896.

211. See *id.* at 898-901 (rejecting Grinzi's First Amendment claim because her employer was not a governmental entity). Because Grinzi did not specifically allege a state constitutional basis for her claim, the court did not "reach the issue of whether [similar provisions in] the California Constitution [regarding free speech and association] support public policy against terminations." *Id.* at 898 n.3. Interestingly, the Fourth District used the California Constitution's right of privacy to distinguish the First Amendment as a public policy basis for wrongful termination claims based on the California provision's application against private actors, thereby implying the state privacy right would support such a claim. *Id.* at 899.

212. See *id.* at 901 (reiterating *Barbee*'s holding that section 96(k) is merely a procedural guarantee).

213. See *id.* at 901-02 (allowing Grinzi to raise "[f]or the first time on appeal . . . section 98.6 as a statutory provision supporting public policy against termination for lawful conduct during nonworking hours").

214. *Id.* at 903.

215. *Id.* The Fourth District also dismissed Grinzi's claim that section 98.6 protected exercise of "any right" regardless of its source, holding the uncodified expression of legislative intent clearly limited the section's application to retaliatory employment actions based on assertion of rights under the California Labor Code. *Id.* at 903-04.

216. See *supra* notes 181-90 and accompanying text.

217. See, e.g., L. CAMILLE HEBERT, EMPLOYEE PRIVACY LAW § 13:11.50 (2004) (criticizing *Barbee* and *Grinzi* for "narrow interpretations" of sections 96(k) and 98.6 that "do not appear to be compelled by the literal terms of the statute" and predicting that as so interpreted these sections "will provide little protection to private sector employees").

218. See, e.g., 2004 Cal. Stat. ch 221 (modifying California Labor Code section 2699 to require employees to meet certain procedural requirements before filing private suits against their employers for Labor

unlikely the Legislature will pass such a statute in the near future. Absent statutory protection for lawful off-duty activity, California employees must look to existing sources of public policy to support wrongful discharge tort claims based on termination for engaging in such conduct.<sup>219</sup>

### B. Wrongful Discharge in Violation of Public Policy—*Tameny* Claims

California was the first state to recognize a tort claim for wrongful discharge in violation of public policy.<sup>220</sup> Referencing the leading California Supreme Court case on this issue, *Tameny v. Atlantic Richfield Co.*,<sup>221</sup> such claims are commonly known as *Tameny* claims. The threshold question in a *Tameny* claim is whether the conduct for which the employee was terminated is protected by public policy.<sup>222</sup> California courts use a four-part test to determine whether a policy is “public.”<sup>223</sup> The policy must be: (1) based on a constitutional or statutory provision; (2) for the benefit of the public, not just to the individual asserting it; (3) well established at the time of discharge; and (4) substantial and fundamental.<sup>224</sup> A review of the case law development of this test is necessary before analyzing whether California’s constitutional privacy right is considered a public policy supporting a wrongful discharge claim for termination based on off-duty intimate association.

*Petermann v. International Brotherhood of Teamsters* is the seminal wrongful discharge in violation of public policy case.<sup>225</sup> Peter Petermann alleged he was fired for refusing to give false testimony before a legislative committee.<sup>226</sup> The Second District Court of Appeal first found that California had a clear public

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Code violations); Cal. Proposition 64 (2004) (amending California Business and Professions Code sections 17203 and 17204 to eliminate class action suits under California’s Unfair Competition Law). The Unfair Competition Law provides an alternative means of remedying employers’ Labor Code violations. *See, e.g.*, *United Farm Workers v. Dutra Farms*, 100 Cal. Rptr. 2d 251 (Cal. Ct. App. 2000) (holding farm workers’ claim that their employer bribed them to influence other employees regarding union representation supported liability under California’s Unfair Competition Law).

219. *See Barbee v. Household Automotive Fin. Corp.*, 6 Cal. Rptr. 3d 406, 414 (Cal. Ct. App. 2003) (“[T]o prevail on a public policy claim . . . Barbee must establish that he was terminated for asserting civil rights guaranteed by article I of the California Constitution.”); *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 903 (Cal. Ct. App. 2004) (holding a termination in violation of public policy claim must be based on an assertion of “a recognized constitutional right”).

220. *See* 2 ROTHSTEIN, *supra* note 10, § 9.10, at 443 (labeling *Petermann v. International Brotherhood of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959), “the earliest wrongful discharge [in violation of public policy] case”).

221. 610 P.2d 1330 (Cal. 1980).

222. *See* 1 MING W. CHIN ET AL., CALIFORNIA PRACTICE GUIDE: EMPLOYMENT LITIGATION, *Employment Tort Claims* § 5:45 (2003) (“The existence of a pertinent public policy is crucial to a *Tameny* claim.”).

223. *Id.* § 5:46.

224. *Silo v. CHW Med. Found.*, 119 Cal. Rptr. 2d 698, 703 (Cal. 2002) (internal quotations and citations omitted).

225. 344 P.2d 25 (Cal. Ct. App. 1959).

226. *Id.* at 26.

policy against perjury because it criminalized the act under Penal Code section 118.<sup>227</sup> This policy was so fundamental, the court said, that “every impediment, however remote to the [policy’s] objective, must be struck down when encountered.”<sup>228</sup> The Second District then held that Petermann’s complaint sufficiently stated a claim for wrongful discharge<sup>229</sup> because to do otherwise “would be to encourage criminal conduct upon the part of both the employee and employer.”<sup>230</sup> The California Supreme Court’s definitive adoption of the wrongful discharge cause of action in *Tameny* was based on similar facts. Gordon Tamény was fired by Atlantic Richfield after fifteen years of service because he refused to participate in an illegal price fixing scheme.<sup>231</sup> Finding such a scheme to violate, *inter alia*, California’s Cartwright Antitrust Act,<sup>232</sup> the Supreme Court upheld Tamény’s wrongful discharge claim.<sup>233</sup> Because both of these cases rested on clear violations of California statutes, neither provided guidance about other sources of public policy that might support a tort claim for wrongful discharge.

Unfortunately for California’s Courts of Appeal, which had split over whether public policy must be “rooted in a statute or constitutional provision,”<sup>234</sup> the California Supreme Court failed to resolve the issue in its next wrongful discharge in violation of public policy case, *Foley v. Interactive Data Corp.*<sup>235</sup> However, the court did provide guidance regarding when a policy is considered “public.” Daniel Foley was fired after informing his employer that his new supervisor was under investigation for embezzling funds from his previous employer.<sup>236</sup> The California Supreme Court found no clear statutory basis for a policy requiring an employee to pass on such information to his or her employer.<sup>237</sup> Observing that prior wrongful discharge cases involved policies intended to protect the public, such as those requiring criminal activity to be reported to proper authorities, the court held that when a duty to disclose “serves only the private interest of the employer,” that duty cannot form the basis for a *Tameny* claim.<sup>238</sup> In short, because Foley’s disclosure benefited only Interactive Data, not the public at large, it was not protected by the public policy exception to the at-will employment doctrine. Additionally, *Foley* established the

227. *Id.* at 27.

228. *Id.* at 28.

229. *See id.* (“[P]laintiff alleged sufficient facts to show that his discharge was improper.”).

230. *Id.* at 27.

231. *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1331-32 (Cal. 1980).

232. *See id.* at 1331 (repeating complaint’s allegations that Arco’s conduct violated “express provisions of the Sherman Antitrust Act, the Cartwright Act” and a federal court consent decree) (citations omitted); *id.* at 1334 n.9 (noting Arco’s concession that, if true, the complaint’s allegations would establish that Arco violated antitrust laws).

233. *Id.* at 1337.

234. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 378-79 (Cal. 1988).

235. *Id.* at 373.

236. *Id.* at 375-76.

237. *Id.* at 379.

238. *Id.* at 380.

requirement that the policy be “firmly established” at the time of discharge<sup>239</sup> to provide employers with adequate notice of conduct that will subject them to tort liability.<sup>240</sup>

The issue left outstanding in *Foley*, whether public policy must be “rooted in” statutory or constitutional provisions, was answered in the affirmative by the California Supreme Court in *Gantt v. Sentry Insurance*.<sup>241</sup> Citing *Foley* for the proposition that a policy must be “fundamental” and “substantial” to support a *Tameny* claim, the court acknowledged the difficulty in drawing a line between “claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee.”<sup>242</sup> The court’s solution to this problem was to require that a policy supporting a wrongful discharge claim have “a basis in either the constitution or statutory provisions.”<sup>243</sup> This approach “strikes the proper balance among the interests of employers, employees and the public” by giving employers adequate notice of “the fundamental public policies of the state and nation.”<sup>244</sup> The California Supreme Court has since expanded the basis of public policy to include administrative regulations “promulgated to address important public safety concerns.”<sup>245</sup>

The protection of intimate association under the article I, section 1 privacy right appears to qualify under the four prong “public policy” test. First, the protection of intimate association is clearly based on a constitutional provision, article I, section 1’s enumeration of “privacy” as one of Californian’s “inalienable rights.” Second, though upholding the privacy right in any individual case will benefit the affected employee, it will also benefit the public by limiting employers’ ability to condition employment on conformance with an employers’ particular views on morality or workplace efficiency. Third, protection of intimate association, though recently the spotlight of national attention in *Lawrence*, has been part of California law for at least a decade. Finally, in accordance with the constitutional classification of privacy as an “inalienable right,” California courts have consistently described protection of intimate association as a fundamental right.

### C. *The Constitutional Privacy Right as a Limitation on Private Employers’ Conduct*

To date, California courts have recognized the state constitution’s article I right of privacy as a potential limitation on private employers’ conduct in three

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239. *Id.* at 378.

240. *Stevenson v. Superior Court*, 66 Cal. Rptr. 2d 888, 892 (Cal. 1997).

241. 824 P.2d 680 (Cal. 1992).

242. *Id.* at 684.

243. *Id.* at 687-88.

244. *Id.* at 688.

245. *Green v. Ralee Eng’g Co.*, 960 P.2d 1046, 1050 (Cal. 1998).

specific areas: drug testing, psychological screening, and, most importantly, termination based on marriage. An examination of the major California Court of Appeal cases in each of these areas provides insight into the scope of the privacy right in the private employment context. This inquiry also shows how the courts balance this right against the employer's interests in regulating particular conduct.

The first drug testing privacy case, *Wilkinson v. Times Mirror Corp.*,<sup>246</sup> came before the First District Court of Appeal in 1989. Times Mirror required all job applicants to pass a physical examination including a urine test for drugs and alcohol.<sup>247</sup> Three applicants who refused to take the drug test and were thus denied jobs with Times Mirror's subsidiary, Matthew Bender and Company, sued the employer claiming the testing policy violated their right of privacy under the California Constitution.<sup>248</sup> Noting that the constitutional privacy right is not absolute, the First District Court stated that "[a] court must engage in a balancing of interests" in deciding claims alleging an invasion of that right.<sup>249</sup> Following recent United States Supreme Court drug testing cases,<sup>250</sup> the court of appeal adopted a reasonableness test<sup>251</sup> that balanced the intrusiveness of the testing, and therefore the applicants' reasonable expectations of privacy, against the employer's interest in testing.<sup>252</sup>

Recognizing that the applicants had a privacy interest in the collection and testing of their urine, the court then specifically identified three factors that reduced their privacy expectation in this situation.<sup>253</sup> First, the plaintiffs' expectation was lower because the application process necessarily entails the disclosure of personal information.<sup>254</sup> Second, the court found that the applicants had explicit notice that passing the test was required for employment.<sup>255</sup> Finally, because the sample was collected in a medical environment and the actual results were not disclosed to the employer, the intrusion into applicants' privacy was minimal.<sup>256</sup> Consequently, because Matthew Bender's testing procedures

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246. 264 Cal. Rptr. 194 (Cal. Ct. App. 1989).

247. *Id.* at 196.

248. *Id.* at 197.

249. *Id.* at 202.

250. *See id.* at 201 (discussing the United States Supreme Court's holding in *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), that urine testing for drugs was constitutionally permissible under a test balancing employee's privacy interest against the employer's interest in public safety and noting the Supreme Court's holding in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), that the government's compelling interest in public safety justified testing Customs Service agents for drugs).

251. *See id.* at 203 (stating that, absent a substantial burden on the privacy right, "the operative question is whether the challenged conduct is reasonable").

252. *Cf. Skinner*, 489 U.S. at 621 (adopting a test balancing the employee's privacy interest against the employer's interest in testing to determine whether drug testing is reasonable under Fourth Amendment).

253. *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 203-04 (Cal. Ct. App. 1989).

254. *Id.* at 204.

255. *Id.*

256. *Id.*

significantly reduced the applicants' expectations of privacy, the court held the employer's "legitimate interest in a drug- and alcohol-free work environment" outweighed the applicants' privacy interest.<sup>257</sup>

Two months later, another division of the Fourth District reached the opposite conclusion regarding drug testing of existing employees in *Luck v. Southern Pacific Transportation Co.*<sup>258</sup> Barbara Luck, a successful employee of Southern Pacific's engineering department,<sup>259</sup> was fired when she refused to provide a urine sample for drug testing.<sup>260</sup> Citing *Wilkinson*, the court noted that the collection of urine for drug testing "intrudes upon reasonable expectations of privacy."<sup>261</sup> However, the court quickly departed from *Wilkinson*, finding that a compelling interest standard, rather than one based on reasonableness, applied because Luck was an employee of Southern Pacific, not merely a job applicant.<sup>262</sup> Dismissing the employer's assertion that the testing served its interests in "deterrence, efficiency, competence, creating a drug-free environment, enforcing rules against drug use, and ensuring public confidence in the integrity of the railroad industry,"<sup>263</sup> the First District examined the only interest that might be compelling enough to justify the invasion of Luck's privacy: safety. Though Luck worked for a railroad, her job as a computer programmer took place entirely within the railroad's offices.<sup>264</sup> In no way was she involved with the operation or maintenance of the company's trains.<sup>265</sup> Accordingly, because Luck was not a "safety employee," Southern Pacific had no compelling interest in testing her urine for drugs and its invasion of her privacy was, therefore, unjustified.<sup>266</sup>

The compelling interest standard for justifying an invasion of the California Constitution's right of privacy was further entrenched in California law by the First District's decision in *Soroka v. Dayton Hudson Corp.*<sup>267</sup> Dayton Hudson, the owner and operator of Target stores, required applicants for store security officer positions to take a psychological test.<sup>268</sup> According to Target, the test would screen out applicants "who are emotionally unstable, who may put customers or employees in jeopardy, or who will not take direction and follow Target

257. *Id.* at 205-06.

258. 267 Cal. Rptr. 618 (Cal. Ct. App. 1990).

259. *See id.* at 620-21 (describing Luck's two promotions during her six year employment with Southern Pacific, as well as the responsibilities she had as a computer programmer during her last four years before termination).

260. *Id.* at 621.

261. *Id.* at 625-26.

262. *Id.* at 629, n.13.

263. *Id.* at 632.

264. *See id.* at 630 (observing Luck's job "called for her to travel in order to install computers at other sites").

265. *Id.*

266. *Id.* at 631-32.

267. 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991).

268. *Id.* at 79.

procedures.”<sup>269</sup> The test included questions regarding the applicant’s religious attitudes,<sup>270</sup> as well as questions about sexual orientation.<sup>271</sup> Three applicants who took the test filed suit claiming the test violated, *inter alia*, their state constitutional right of privacy.<sup>272</sup>

Looking both to prior case law and the voters’ intent in enacting the Privacy Initiative, the First District overruled *Wilkinson*’s application of a reasonableness standard to an employer’s invasion of job applicants’ privacy rights, instead holding that any invasion must be justified by a compelling interest.<sup>273</sup> The court then found that both federal and state precedent requires the employer to show a “clear, direct nexus exists between the nature of the employee’s duty and the nature of the [privacy] violation.”<sup>274</sup> Applying this standard to Target’s conceded invasion of its job applicants’ privacy,<sup>275</sup> the First District found that questions about an applicant’s religious beliefs or sexual orientation were at most generally related to an applicant’s ability to perform as a store security officer.<sup>276</sup> Because the challenged questions did not satisfy the nexus requirement of specific job-relatedness, Target’s psychological test violated the California Constitution’s right of privacy.<sup>277</sup>

The only case, to date, addressing marriage under the state constitutional right of privacy, *Ortiz v. Los Angeles Police Relief Ass’n, Inc.*<sup>278</sup> was decided by the Second District Court of Appeal in 2002. Cipriana Ortiz was “Administrator of Retirement and Promotion Benefits” for the Relief Association, a private nonprofit entity that managed and administered employee benefits for the Los Angeles Police Department.<sup>279</sup> When Ortiz told the Association’s executive director that she was engaged to be married to a man serving a fifteen year sentence in California prison for burglary, the Association insisted that she resign or end the relationship.<sup>280</sup> Since Ortiz’s job duties allowed her access to confidential personal information about police officers, the Association viewed the relationship as an “unacceptable—and potentially deadly—conflict of

269. *Id.*

270. *Id.* at 79-80. The true-false questions included: “I feel sure that there is only one true religion;” “I go to church almost every week;” “I believe my sins are unpardonable;” and “I believe there is a Devil and a Hell in afterlife.” *Id.*

271. *Id.* at 80. Questions included: “I am very strongly attracted by members of my own sex;” “I have often wished I were a girl;” and “I have never indulged in any unusual sex practices.” *Id.*

272. *Id.*

273. *Id.* at 82-85.

274. *Id.* at 85-86.

275. *Id.* at 86.

276. *See id.* at 87 (finding that Target made “no more than . . . generalized claims about the [test’s] relationship to emotional fitness” and unsupported assertions regarding the improvement of job performance among store security officers since its implementation).

277. *Id.*

278. 120 Cal. Rptr. 2d 670 (Cal. Ct. App. 2002).

279. *Id.* at 673.

280. *Id.*

interest.”<sup>281</sup> After Ortiz refused to resign or end the relationship, the Association’s Board of Directors fired her, explicitly stating the termination was necessary to resolve the conflict of interest problem.<sup>282</sup>

Citing to California cases holding the state’s constitutional privacy right applies to “expressive association,” the Second District Court initially concluded “the right to marry and the right of intimate association are virtually synonymous.”<sup>283</sup> Finding the Association’s invasion of Ortiz’s privacy right “‘serious’ in every sense of the word,”<sup>284</sup> the court debated the proper standard to apply to the Association’s interest in firing Ortiz. Following an extensive survey of right to marry and anti-nepotism cases, the court concluded that because the Association’s action did not prohibit Ortiz and her inmate fiancé from getting married, it did not implicate the constitutional right to marry.<sup>285</sup> Therefore, the termination need only be justified by a rational relation to a legitimate employer interest.<sup>286</sup> Perhaps predictably, the court concluded that the Association’s conflict of interest policy protected the personal safety of police officers and therefore Ortiz’s termination under that policy was sufficiently related to the Association’s interest to survive a constitutional challenge.<sup>287</sup>

Two important propositions can be drawn from this line of employee privacy right cases. The first is that the constitutional privacy right is given high regard even in the private employment context. *Luck* and *Soroka* both found the privacy right important enough to require the employer to show that an invasion of the right was justified by a compelling interest.<sup>288</sup> Additionally, *Ortiz* recognized the “right to intimate association” as being highly protected by both the federal and state constitutions,<sup>289</sup> even though it applied rational basis scrutiny to the employer’s invasion of the privacy right.<sup>290</sup> Thus, it is clear that California courts place a high value on the constitutionally enumerated right of privacy, including the right of intimate association, even in the context of private employment.

281. *Id.* at 674.

282. *Id.*

283. *Id.* at 678. Later in its opinion the court reiterated that “the state Constitution guarantees not only the right to marry but also the related right to freedom of intimate association.” *Id.* at 681.

284. *Id.* at 681.

285. *Id.* at 683-86.

286. *Id.* at 685.

287. *Id.* at 686.

288. See *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629, n.13 (Cal. Ct. App. 1990) (finding “no reason to depart from existing precedent applying the compelling interest test” to article I, section 1 privacy right cases); *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 84 (Cal. Ct. App. 1991) (stating a compelling interest standard for privacy right violations is consistent with the voters’ intent in enacting the Privacy Initiative).

289. See *Ortiz v. L.A. Police Relief Ass’n, Inc.*, 120 Cal. Rptr. 2d 670, 678-79 (Cal. Ct. App. 2002) (noting that under the California Constitution “the right to marry and the right of intimate association are virtually synonymous” and acknowledging that “the right to marry is a fundamental right in this country, as reflected and guaranteed by state and federal law”).

290. *Id.* at 685.



The second proposition drawn from these cases is that only a high level of impact on the employer or the public resulting from the employee's protected conduct will justify termination in violation of the California right of privacy. In *Luck*, the Court of Appeal held that Southern Pacific had no justifiable reason for requiring Luck to submit to drug testing because her job did not involve public safety.<sup>291</sup> Likewise, the court in *Soroka* found questions on a pre-hiring psychological screening test too tenuously related to the employer's concerns about placing emotionally unstable persons in charge of customer safety and inventory control to justify the intrusion they made on the applicants' constitutional privacy right.<sup>292</sup> *Ortiz*, though it reached an opposite result, also supports this view of the case law. The court upheld Ortiz's termination, despite her argument that her employer's policy required her to choose between her marriage and her job, because allowing her to remain employed after marrying an incarcerated felon could lead to the acquisition of police officers' personal information by criminals, thereby putting the officers at risk in direct contravention of the Police Relief Association.<sup>293</sup> By requiring such compelling justifications for upholding terminations based on invasion of the privacy right, California courts provide a high level of protection for that right.

#### V. RECOGNIZING THE CONSTITUTIONAL RIGHT OF PRIVACY AS A BASIS FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY CLAIMS INVOLVING OFF-DUTY INTIMATE ASSOCIATION

Both federal and California law clearly recognize a fundamental right of privacy regarding intimate association between consenting adults. In *Lawrence v. Texas*, the United States Supreme Court reiterated its view that personal relationships, including the intimate association they incorporate, are protected by the United States Constitution because of their importance in defining one's place in the world.<sup>294</sup> At a minimum, California's explicit constitutional privacy right encompasses the guarantees set forth under the federal right.<sup>295</sup> Thus, the concept of free choice about intimate association expressed in *Lawrence* is implicitly incorporated into the state constitutional privacy right. However, the

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291. *Luck*, 267 Cal. Rptr. at 631-32.

292. *Soroka*, 1 Cal. Rptr. 2d at 87.

293. *Ortiz*, 120 Cal. Rptr. 2d at 686. Even though the Court of Appeal applied rational basis scrutiny to the Police Relief Association's conflict of interest policy, it is likely the policy would have survived strict scrutiny in this case because protecting police officers, particularly the identities of undercover officers, was certainly a compelling interest of the employer.

294. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (finding criminal sodomy laws "seek to control a personal relationship that . . . is within the liberty of persons to choose" under the Fourteenth Amendment's Due Process Clause); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (noting the Fourteenth Amendment's liberty guarantee protects "the most intimate and personal choices a person may make").

295. See *Barker*, *supra* note 59, at 1133 (stating "[f]ederal guarantees provide a floor below which states may not venture" in interpreting analogous state constitutional rights).

protection of intimate association rests on more than mere inference. California courts have consistently recognized "intimate association" as one of the activities protected under the California Constitution's article I, section 1 privacy guarantee.<sup>296</sup> Accordingly, California places a high value on protecting intimate association between consenting adults.<sup>297</sup> Nonetheless, to date, no California court has clearly recognized the constitutional protection of intimate association as a basis for a wrongful discharge in violation of public policy, or a *Tameny*, claim.<sup>298</sup>

The recognition of a *Tameny* claim based on invasion of the constitutional right to privacy regarding off-duty intimate association is appropriate for several reasons. The first is that the California Legislature has not, and appears unlikely to, provide statutory protection for such conduct.<sup>299</sup> As a result, the *Tameny* claim provides the only remedy for termination based on off-duty intimate association. Second, recognition would be consistent with California courts' use of the constitutional privacy right as a limitation on private employers' conduct in other contexts. Finally, recognizing an intimate association *Tameny* claim would not only protect employees but also benefit employers by forcing them to modify existing conflict of interest or antifraternization policies so that they serve the employer's business needs while not intruding on the employee's privacy interest.

California Labor Code sections 96(k) and 98.6, despite some commentators' interpretations, do not provide substantive enforceable rights regarding off-duty intimate association.<sup>300</sup> California courts have held that both sections merely provide a procedural guarantee that the Labor Commissioner's office will take assignment of such claims for employees who are unable to pursue them

296. See, e.g., *Warfield v. Peninsula Golf & Country Club*, 896 P.2d 776, 794 (Cal. 1995) (recognizing "the freedom of intimate association" as one aspect of California's constitutional privacy right); *Ortiz*, 120 Cal. Rptr. 2d at 678 (recognizing both the right to marry and the right to intimate association as falling under the California Constitution's right of privacy); see also *Hill v. NCAA*, 865 P.2d 633, 654 (Cal. 1994) (reporting the that ballot arguments in favor of the Privacy Initiative "refer[red] to the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference in the form of penal and regulatory laws").

297. See, e.g., *Vinson v. Superior Court*, 239 Cal. Rptr. 292, 298 (Cal. Ct. App. 1987) ("California's privacy protection . . . embraces sexual relations."); see also *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 798 (Cal. 1981) (stating California's privacy right protects the "decision whether to bear a child," an interest that is "so private and so intimate" that it should be made without government interference); *Ortiz*, 120 Cal. Rptr. 2d at 679 ("In California, the right to marry is so fundamental that state legislation and the Constitution protect an inmate's right to marry.").

298. It is possible to argue that *Ortiz* did so but the court's analysis focused on the invasion of privacy claim, not the wrongful discharge claim. However, in determining whether *Ortiz*'s privacy right was invaded, the court balanced the extent of that right under the circumstances against the employer's interest affected by her off-duty conduct. Thus, in a sense the Second District engaged in the type of balancing proposed here under the new intimate association *Tameny* claim. Nonetheless, because the court did not clearly run the facts through a *Tameny* analysis, *Ortiz* did not actually establish the new claim proposed here.

299. See *supra*, Part IV.A (concluding that sections 96(k) and 98.6 of the California Labor Code provide no statutory protection for off-duty intimate association).

300. See *supra* Part IV.A (discussing cases interpreting California Labor Code sections 96(k) and 98.6 as creating no new substantive rights).

privately.<sup>301</sup> Thus, the California Legislature has not provided, and appears unlikely to provide, statutory protection of the right of intimate association. However, conduct protected by that right can form the basis for claims assignable under those Labor Code sections.<sup>302</sup> Moreover, as noted above, California courts have consistently declared the importance of the constitutional protection of intimate association.<sup>303</sup> Yet, by not recognizing a *Tameny* claim based on such “protected” conduct, the courts essentially allow private employers to flout their pronouncements of the right’s significance. In the absence of statutory protection, a *Tameny* claim is necessary to vindicate the intimate association right in the private employment context.

Recognizing such a *Tameny* claim would be consistent with California courts’ application of the constitutional privacy right in other aspects of private employment. While the privacy right is not absolute,<sup>304</sup> courts have typically required a strong showing that an employer’s action or policy violative of an employee’s privacy right is closely related to the employer’s legitimate business interests.<sup>305</sup> The drug testing cases are particularly instructive. In *Luck*, the Court of Appeal held that collecting urine for drug and alcohol testing was a violation of the constitutional privacy right in part because it involved an intimate bodily function.<sup>306</sup> The employees’ urine was tested for “drugs, alcohol or medications.”<sup>307</sup> Consumption of the latter two are in most instances lawful when done outside the workplace. Thus, *Luck* also involved, though indirectly, the effect of off-duty conduct on the employer’s business. In that case, because Luck’s job did not implicate public safety, the court held the urine test, and thus implicitly adverse employment action based on off-duty conduct, a privacy right violation.<sup>308</sup> Accordingly, it appears a California court would hold uncon-

301. See *supra* Part IV.A (noting that to date California courts have uniformly interpreted California Labor Code sections 96(k) and 98.6 as providing purely procedural guarantees).

302. See *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 903 (Cal. Ct. App. 2004) (“[T]o successfully establish a tortious discharge claim under this provision of section 98.6, [a plaintiff] must allege her discharge occurred because she asserted a recognized constitutional right.”); *Barbee v. Household Automotive Fin. Corp.*, 6 Cal. Rptr. 3d 406, 414 (Cal. Ct. App. 2003) (“[I]n order to prevail on a public policy claim pursuant to Labor Code section 96, subdivision (k), [a plaintiff] must establish that he was terminated for asserting civil rights guaranteed by article I of the California Constitution.”).

303. See *supra* note 297 and accompanying text.

304. See *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629 (Cal. Ct. App. 1990) (noting the “constitutional right to privacy does not prohibit all incursion into individual privacy”); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194, 202 (Cal. Ct. App. 1989).

305. E.g., *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 84-85 (Cal. Ct. App. 1991) (applying the compelling interest standard to an employer’s justification of invasion of job applicants’ privacy right); *Luck*, 267 Cal. Rptr. at 629 (stating any invasion of the constitutional right of privacy “must be justified by a compelling interest”); see *Ortiz v. L.A. Police Relief Ass’n*, 120 Cal. Rptr. 2d 670, 685-86 (Cal. Ct. App. 2002) (applying rational basis scrutiny to employer’s conflict of interest plan but characterizing the employer’s interest in preventing the disclosure of confidential information about police officers as “paramount”).

306. See *Luck*, 267 Cal. Rptr. at 629 (“[T]he process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.”).

307. *Id.* at 621.

308. *Id.* at 631-32.

stitutional a termination based on a positive urine test for alcohol when that substance was consumed during off-duty hours and the consumption had no effect on the employee's ability to do his or her job. Likewise, off-duty intimate association that has no effect on the employee's job ability or employer's other compelling interests should not be a basis for discharge under California law.

A final consideration supporting recognition of an intimate association *Tameny* claim is the effect it will have on employers' conflict of interest or antifraternization policies. Currently, many such policies are implied;<sup>309</sup> and even when written they tend to be rather ambiguous.<sup>310</sup> Knowing it will have to defend any action under the policy as necessary to serve a compelling business interest, an employer will likely think more carefully about what conduct actually hinders its business interests and revise its conflict of interest policy accordingly to prohibit only such conduct. This reassessment and clarification will prepare the employer for possible future litigation in two ways. First, it will make it much easier for the employer to show that the conduct underlying the discharge threatened the employer's compelling interest.<sup>311</sup> Second, it will help the employer prove the employee had actual notice that his or her conduct was actionable by the employer, thereby making it more difficult for the employee to establish a reasonable privacy interest in that particular conduct.<sup>312</sup> Thus, the *Tameny* claim would serve both employees and employers by clarifying company policy regarding off-duty intimate association, thereby reducing litigation over discharge based on that conduct.

Even if litigation does result, the burden on employers in defending these *Tameny* claims will not be insurmountable. Under this proposed cause of action, an employer must justify a discharge based on lawful off-duty intimate association by showing the conduct underlying termination was in conflict with a compelling business interest of the employer.<sup>313</sup> But, such a high standard would not necessarily preclude employers from prevailing against these claims. For

309. See Wilson, Filosa & Fennel, *supra* note 66, at 79 (observing that many employers "have avoided adopting any formal policy explicitly addressing the issue of romance in the workplace, choosing instead to rely on unwritten rules [and their belief that] as a matter of corporate culture or implied policy [fraternization] will be discouraged or simply not tolerated") (internal quotations and citations omitted).

310. See *id.* at 86 (advising employers to adopt a "well-drafted" antifraternization policy).

311. See *id.* at 87 (advising employers to "structure [antifraternization policies] around the impact potential romantic relationships at work may have on job performance [to] increase the likelihood that a court will find a rational connection between the policy and the achievement of legitimate business objectives").

312. See *id.* ("The more notice employees have regarding their employer's anti-fraternization policy, the weaker their argument that they had a reasonable expectation of privacy regarding the romantic relationship.") To prevail on an invasion of privacy tort claim under California law, an employee must prove he or she had a reasonable expectation of privacy regarding specific conduct. See, e.g., *Barbee v. Household Automotive Fin. Corp.*, 6 Cal. Rptr. 3d 406, 412 (Cal. Ct. App. 2003) (concluding Barbee failed to establish a reasonable expectation of privacy because company policy required a supervisor who engaged in an "intimate relationship" with a subordinate to bring the relationship to the attention of management).

313. Cf. *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 629 (Cal. Ct. App. 1990) (declaring mandatory employee urinalysis, which necessarily invades the constitutional right of privacy, "must be justified by a compelling interest").

example, preventing sexual harassment claims would likely be a compelling business interest.<sup>314</sup> Thus, because a supervisor dating a subordinate might subject the employer to sexual harassment liability,<sup>315</sup> an employer would be justified in firing either or both employees if they refused to end the relationship. Similarly, conflicts of interest in the areas of public safety<sup>316</sup> and direct competition for customers<sup>317</sup> would also probably continue to be upheld as valid bases for discharge. However, a discharge based primarily on an employer's particular moral concerns,<sup>318</sup> or a view that an off-duty relationship impacts its business when it clearly does not,<sup>319</sup> would not survive this new *Tameny* claim.

## VI. CONCLUSION

California's private sector employers currently enjoy wide discretion to discharge employees based on lawful off-duty intimate association. While this is certainly not a problem of epidemic proportions, it is nonetheless an issue that should be addressed given the increasing prevalence of intimate relationships between co-workers.<sup>320</sup> Unfortunately, the California Legislature has taken no steps to enact legislation to address this problem, nor is such action likely, given the pressures on legislators to put employer interests over those of employees.<sup>321</sup> Moreover, adoption of a "lifestyle protection" statute like those in force in other states would not necessarily guarantee protection for off-duty intimate association.<sup>322</sup>

Given this legislative indifference, it is appropriate for California courts to recognize a *Tameny* claim for wrongful termination based on lawful off-duty

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314. See Wilson, Filosa & Fennel, *supra* note 66, at 80-81 (noting that because of potential legal liability for sexual harassment arising from co-worker intimate relationships, "an employer has a legitimate business interest in drafting rules and regulations" to prevent them).

315. See *id.* at 79 (observing that supervisor-subordinate relationships "may trigger a sexual harassment claim under Title VII of the Civil Rights Act").

316. *E.g.*, Ortiz v. L.A. Police Relief Ass'n, 120 Cal. Rptr. 2d 670, 686 (Cal. Ct. App. 2002) (upholding termination of a police benefits administrator who was engaged to incarcerated felon because the relationship "could jeopardize the personal safety of the officers").

317. *E.g.*, Fatland v. Quaker State Corp., 62 F.3d 1070, 1071-73 (8th Cir. 1995) (upholding termination of an oil company employee for failure to divest personal interest in fast-lube business because the employee's position allowed him to obtain information about his side business's competitors).

318. *E.g.*, Staats v. Ohio Nat'l Life Ins. Co., 620 F. Supp. 118, 120 (W.D. Pa. 1985) (upholding employee's termination based on appearing at company convention with a woman who was not his wife).

319. *E.g.*, Patton v. J.C. Penney Co., 719 P.2d 854, 856 (Or. 1986) (observing that an employee's "social relationship [with a co-worker] did not interfere with [his] performance at work, for during this time he earned several [performance] awards" but nonetheless holding the employee not wrongfully discharged based on refusal to end relationship).

320. See *supra* notes 4-9 and accompanying text (discussing the growing acceptance of workplace romance by employees).

321. See *supra* note 218 and accompanying text (discussing recent statutory restrictions of employees' legal rights against their employers).

322. See *supra* Part III.B (concluding that existing "lifestyle protection" statutes fail to adequately protect employees' off-duty intimate association).

intimate association. For far too long, courts have been exceedingly deferential to employers' proffered reasons for discharge at the expense of employee's privacy rights.<sup>323</sup> The California Constitution's article I right of privacy provides a method for the state's courts to shift the balance to its proper place, squarely between the employer and employee. However, to prevent the balance from shifting too far in the employees' favor, courts should allow the employer to defend against this new *Tameny* claim by showing the conduct prompting the discharge was actually in conflict with the employer's business interests.<sup>324</sup> This approach would allow employers to continue to terminate employees whose off-duty relationships adversely affect the workplace or create a conflict of interest.<sup>325</sup> Moreover, this new claim would strongly encourage employers to codify their conflict of interest and antifraternization policies, thereby clarifying acceptable employee conduct and potentially reducing the number of wrongful termination claims filed against them.<sup>326</sup> In sum, recognition of a *Tameny* wrongful discharge in violation of public policy claim based on an employee's off-duty intimate association would bring a much-needed balance and clarity to the growing issue of intimate relationships between co-workers.

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323. See *supra* Part III.A (chronicling courts' refusals to require employers to provide justification for discharging employees based on off-duty intimate association).

324. Cf. *Luck v. S. Pac. Transp. Co.*, 267 Cal. Rptr. 618, 631-32 (Cal. Ct. App. 1990) (holding because off-duty drug or alcohol consumption did not implicate an employer's interest in protecting public safety, mandatory urine testing for consumption violated Luck's privacy right).

325. See *supra* notes 314-17 and accompanying text.

326. See *supra* notes 309-12 and accompanying text.

